

Rawls's Law of Peoples

Human rights, Recognitional Legitimacy and Positive Duties across Borders

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Master's Thesis in Political Science
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UNIVERSITY OF OSLO

2012-05-19

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IV

Summary

This thesis discusses *The Law of Peoples* (1999) in light of two main questions. These questions are:

- (1) Can the conception of human rights Rawls adopts in the Law of Peoples be plausibly defended?*
- (2) Bearing in mind the criticisms of Rawls's conception of human rights identified in the treatment of question (1), how can the Law of Peoples be adjusted in a way that affords added normative force to the idea of positive duties across societies?*

Question (1) is approached by discussing three interpretations of Rawls's justification for his narrow conception of human rights. The argumentation proceeds in the following manner: Firstly I argue that the fact that some peoples or persons have distorted conceptions about morality is not a compelling reason to exclude certain rights from the human rights principle. This argument is in line with common liberal criticisms of Rawls, presented by for instance Allen Buchanan (2006). Furthermore I argue that the fact that the dominant groupings within a society reject important liberal rights is not a convincing argument for the claim there is internal political legitimacy in decent societies.

Secondly I discuss Samuel Freeman's (2006b) proposed justification of Rawls's list of human rights. Freeman argues that the representatives for liberal peoples in the original position should be modelled as exclusively self-interested. From this he argues that they would endorse the same list of human rights presented by Rawls. I claim that this argument fails at three levels. 1. It is in fact unclear that such representatives would endorse Rawls's list of human rights. 2. Freeman's justification for the human rights principle is unappealingly instrumental. 3. To model the representatives of liberal peoples as uninterested in the human rights situation in other societies is implausible. Furthermore, it seems to contradict what Rawls himself writes.

Third I discuss David A. Reidy's (2006) proposed justification of Rawls's list of human rights. Rawls's list of human rights only contains those rights he believes are internationally enforceable. As such they challenge the self-determination of states that do not respect them. Reidy argues that it would be unreasonable of liberal peoples to agree to a list of internationally enforceable human rights that allows coercive liberalization of certain well-ordered non-liberal peoples. Although this argument is associated with certain problems, I

claim that it provides a plausible defence of Rawls's list of human rights. However, it opens up a new discussion on whether the role of human rights in a theory of international justice should be to specify when it in principle is legitimate to apply forceful intervention. Upon addressing this discussion I argue that the Law of Peoples allows room for a contemporary understanding of the role of human rights. Furthermore I argue that since the Law of Peoples is a theory that deals with the question of *recognitional* legitimacy and not internal political legitimacy, Rawls does not confound justification and enforcement issues, nor ideal and non-ideal theory. Rather, it is his critics that confound domestic and international theory. Even so, I acknowledge that if Rawls included a larger scope of measures aimed at achieving justice in international relations to the theory, he could have included a more comprehensive list of human rights. Furthermore I argue that Rawls's theory would benefit from such an adjustment.

Question (2) is approached first by an argument that it is possible to reconcile the Law of Peoples with certain aspects of liberal cosmopolitanism. Here, I argue that it is possible to combine two key liberal cosmopolitan beliefs with the Law of Peoples. These are: 1. For internal political legitimacy to be present in any polity it needs to be organized as a liberal democracy. 2. An overarching goal for the foreign policy of a liberal state should be to work towards the democratization and liberalization of all presently non-liberal states. After this argument is established I propose a theory of international justice that builds on Rawls's, yet involves certain adjustments. This theory affords added normative force to the idea of positive duties across borders as well as universal human rights. The argument proceeds by applying Rawls's first-level original position in all the domestic societies in the world and additionally by populating the second-level original position with representatives for all these societies. These representatives then choose the principles of international justice. The idea of popular sovereignty inherent in the use of social contracts helps conceptualize the representatives in this second-level original position. I argue that if Rawls is correct in *his* analysis, the representatives in my version will choose the same principles as those Rawls argues in favor of. However there will also be certain subtle, yet nonetheless important differences. I think it is necessary to adjust Rawls's theory, because I do not believe that the duty of assistance in fact follows from his approach.

Foreword

I commenced work on this thesis in September, 2011 and finished in May, 2012. Throughout this period I approached John Rawls's book *The Law of Peoples*, from numerous perspectives and viewpoints. However, I never quite felt satisfied until I began focusing on Rawls's human rights principle. Due to the continual shifting of my focus, I wish to thank my supervisor Robert Huseby for his ongoing patience and calming presence. Furthermore, I thank him for providing numerous helpful comments and questions and for the multiple discussions we had regarding the topics covered in this thesis. Finally, I thank Brad C. Smith for offering numerous helpful suggestions and comments to the later drafts.

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1 Introduction

1.1 John Rawls and his Theories

The question of who was the second-greatest political philosopher of the twentieth century is a worthy topic of debate. The question of who was the greatest is not. Offering any name other than John Rawls (1921-2002) could only be an attempt to be deliberately provocative (Wolff 2008, 10).

1.1.1 John Rawls

John Rawls's status as the most important thinker in political philosophy during the last century or so is more or less undisputed. Gerald A. Cohen (2008, 11) regards Rawls's magnum opus – the modestly titled *A Theory of Justice* (1971) – as one of the three greatest works of western political philosophy (along with Plato's *The Republic*, and Hobbes's *Leviathan*). In *Anarchy State and Utopia*, a book that lays out ideas that are diametrically opposed to that of Rawls's, Robert Nozick (1974, 183) writes:

A Theory of justice is a powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy which has not seen its like since the writings of John Stuart Mill, if then.

These are kind words considering they are coming from one of Rawls's staunchest critics.

Rawls's status is not simply defined by how strongly *A Theory of Justice* resonated, and continues to resonate with people who take an interest in political philosophy. Rather, one must consider that Rawls reinvigorated the field of political philosophy at a time when academic interest was low and “(...) political philosophy had been starved of a grand theory” (Wolff 2008, 10). Therefore Rawls is not only important because of the inherent value of his theories, but also because of his monumental influence to the field of political philosophy. Obviously, these aspects are not unrelated, but they reflect two distinct aspects of why Rawls is the greatest political philosopher of the twentieth century.

1.1.2 A Brief Summary of Rawls's Main Work

Three theories make up Rawls's main body of work. Each is presented in separate books.

These books include the already mentioned *A theory of justice* (1971) (hereafter: TJ), *Political liberalism* (1993) (hereafter: PL) and *The Law of Peoples* (1999) (hereafter: LP).

In TJ Rawls makes use of a special type of social contract to argue for a specific set of principles of justice. He imagines a hypothetical "original position" whereby the citizens of a polity come together to choose the principles that shall guide the institutions of their society (Rawls 1999a, 15-16). The original position is non-historical and purely hypothetical. It is a thought experiment. The central feature of this original position is a "veil of ignorance", which hides information the parties might have and that are arbitrary from a moral point of view and otherwise would influence the agreement. The participants are thus unaware of their values, talents, gender, class, wealth, income, or other similar facts that Rawls believes should not influence what principles of justice they would favour (Rawls 1999a, 118-123). The parties to the original position are modelled to choose the principles that best reflect their own self-interest. Because of the veil of ignorance, each party to the original position has to consider how the fortunes of every group in society would come out under the chosen principles. This mechanism emerges because all the participants know that once the veil is lifted anyone could risk finding themselves among the least advantaged group of society. According to Rawls (1999a, 266), this impartial situation would lead to the choosing of the following principles of justice to apply to the basic structure of society:

[First principle:] Each person is to have an equal right to the most to the most extensive scheme of equal basic liberties compatible with a similar system of liberty for all

[Second principle:] Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged (...), and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

Rawls argues that the first principle takes priority over the second. The first part of the second principle, known as the "difference principle", is the most distinctive. This principle means that inequalities that benefit the better off (for instance the talented) are only allowed if these inequalities benefit the worst off group. Therefore a society is just if the least advantaged group of society are better off than they could have been under alternative arrangements (Rawls 1999a, 65).

In PL, Rawls argues that the great diversity of reasonable, comprehensive doctrines found in democratic society is a permanent feature of democratic societies. Rawls (1993, 36) calls this “the fact of reasonable pluralism”. This aspect was not addressed in TJ. Crucially it means that “(...) the idea of a well-ordered society of justice as fairness¹ is unrealistic” (Rawls 1993, xvii) because realizing the principles of TJ is not possible even “(...) under the best of foreseeable conditions” (Rawls 1993, xvii). However, despite this pluralism, Rawls argues that an overlapping consensus on political principles is possible between reasonable citizens². In order to show this Rawls develops a string of new concepts. PL can be seen as a revision of the theory of justice elaborated in TJ. As a result of the fact of reasonable pluralism the difference principle is downplayed. However, PL answers “(...) the conceptually prior questions of legitimacy and stability(...)” within a liberal society. These questions then sets the background for the theory elaborated in TJ (Wenar 2008, section 3).

In LP, Rawls (1999b) addresses the topic of international justice. Other political thinkers, such as Thomas Pogge (1989), had already developed a global extension of the ideas in TJ, including a global version of the difference principle. Yet, in LP Rawls takes a very different stance. Instead of globalizing the principles of justice from TJ, Rawls develops a theory for the just foreign policy of liberal peoples. His starting point is what he calls a first-level original position, which set the principles for various liberal domestic societies. The principles of this first-level original position are constrained by the concepts put down in PL (Rawls 1999b, 30-32; Rawls 1993, 137n). Representatives from the various liberal domestic societies (or in Rawls’s words: liberal “peoples”) then convene in a second-level original position where they endorse a list of relatively conservative and familiar rules for contemporary international relations as the principles of international justice. Amongst the principles is a human rights principle that set limits on several of the other principles, in addition to a duty of assistance, which seeks to raise burdened societies up to a level that enable them to sustain liberal or decent institutions (Rawls 1999b, 37). In addition, Rawls (1999b, 59-62) argues that certain non-liberal, “decent” societies deserve to be tolerated in the sense that they should not be sanctioned for lack of liberal institutions and be recognised as equal participating members of the Society of Peoples³. Part of this argument involves

¹ Rawls refers to the theory in TJ as “Justice as Fairness”.

² Reasonable citizens are willing to propose and abide by mutually acceptable rules, if assured that others will also do so (Rawls 1993, 49).

³ When Rawls uses the term ”Society of Peoples” he means all the peoples that follow the ideals and principles of the Law of Peoples (Rawls 1999b, 3). This society might in practice take the form of an idealized version of the United Nations (Rawls 1999b, 84).

invoking a third original position where representatives for decent peoples endorse the same principles for international justice as liberal peoples. Notably, decent societies are not democratic and apply restrictions on the freedom of speech. However, they honour a list of basic human rights specified by Rawls.

1.2 The Thesis: Purpose, Plan and Relevance

1.2.1 Purpose and Problems

This thesis discusses the Law of Peoples, Rawls's theory of justice in international relations. Its focus is arguably one of the most controversial aspects of the theory, namely its conception of human rights. What first and foremost distinguishes Rawls's list of human rights is that it is constrained to a set of urgent rights. At the centre of the controversy lies the fact that Rawls's list of human rights is short. Rawls relegates what is commonly seen as important human rights entailing democracy, freedom of speech and non-discrimination as merely liberal aspirations. Therefore the main purpose of this thesis is to answer the following question:

(1) Can the conception of human rights Rawls adopts in the Law of Peoples be plausibly defended?

In addition to the part of the thesis that consists of a critical review, there is also a constructive ambition. Bearing in mind some of the valid criticisms of Rawls's conception of human rights, I propose an alternative theory of international justice that is potentially consistent with all of Rawls's judgements about tolerance for certain non-liberal peoples and list of human rights. The primary aim of this sketched theory is to suggest a way to strengthen a weak point of Rawls's theory, in particular its inability to offer a credible defence for the notion of positive duties across societies. The development of this alternative theory answers the following question:

(2) Bearing in mind the criticisms of Rawls's conception of human rights identified in the treatment of question (1), how can the Law of Peoples be adjusted in a way that affords added normative force to the idea of positive duties across societies?

The human rights principle and the duty of assistance are related because once the duty of assistance is fulfilled, all previously burdened societies would respect and honour Rawls's list of human rights. However, the duty of assistance is a separate issue from that of human rights. To some extent this second question therefore tackles a different issue than the first.

The sketched theory combines several of the intuitions of liberal cosmopolitanism with the judgements and general approach in LP. A common understanding of the Law of Peoples however, is that these two approaches are contradictory at important junctions. Liberal cosmopolitans generally argue that the proper way to evaluate principles of international justice is by a global original position, in which representatives for all the individuals in the world are present. The difference between the two schools of thought that is of most relevance for my thesis is the judgements on the place of certain types of non-liberal peoples in the theory. An important part of my discussion is to argue that the Law of Peoples is not as contradictory in its relation to liberal cosmopolitanism as is commonly understood⁴. The main reasoning behind this claim is that the Law of Peoples is not incompatible with the overall goal of a world of only liberal democracies. Furthermore, that the Law of Peoples only argues that decent peoples deserve recognitional legitimacy. Rawls's theory does not say that decent peoples are legitimate or just from an internal point of view.

1.2.2 Plan and Main Arguments

This thesis treatment of LP depends, in addition to Rawls's own text, heavily on different interpretations of Rawls's view. In practice this means that question (1) is answered by assessing different interpretations of Rawls as well as assessing Rawls's own text. To the extent that these interpretations of Rawls draws on qualitatively different arguments he makes or implies, my treatment can be seen as separating the arguments for the conception of human rights in LP that I deem implausible from the ones I deem plausible.

In this thesis I present six main claims, the first four of which can be seen as belonging to question (1). Of the remaining two, one arises from question (2). The last claim underlines the discussion seen as a whole. These claims are the following:

⁴ For an account of some of the differences between the liberal cosmopolitan view and the Law of Peoples, see for instance Kok-Chor Tan (2005).

- i. *The prevailing moral beliefs of some domestic societies might, according to Rawls, reject liberal ideas such as the belief that all individuals should be treated as free and equal. Rawls thinks that some of these non-liberal societies nevertheless deserve to be tolerated. Therefore he argues that liberals should not propose rules that decent peoples, because of their moral beliefs, would reject. I claim that the fact that decent non-liberal peoples might have distorted conceptions about morality is not a compelling reason to exclude certain rights from a list of human rights.*
- ii. *Samuel Freeman argues that the representatives for liberal peoples in the original position should be modelled as exclusively self-interested. From this he argues that they would in fact endorse the same list of human rights presented by Rawls. I claim that this argument fails at three levels: Firstly, It is in fact unclear that such representatives would endorse Rawls's list of human rights. Secondly, his justification for the human rights principle is unappealingly instrumental. Lastly, to model the representatives of liberal peoples as uninterested in the human rights situation in other societies is implausible. Furthermore, it seems to contradict what Rawls himself writes.*
- iii. *Rawls's list of human rights only contains those rights he believes are internationally enforceable. As such they challenge the self-determination of states that do not respect them. David A. Reidy argues that it would be unreasonable of liberal peoples to agree to a list of internationally enforceable human rights that allows coercive liberalization of certain well-ordered non-liberal peoples. Although this argument is associated with certain problems, I claim that it gives a plausible defence of Rawls's list of human rights.*
- iv. *Reidy's defence of Rawls's list of human rights is contingent on the idea that the list should only include rights that in principle warrant coercive sanctions. I believe two criticisms can be made against this role for the human rights principle. The first argues that it does not reflect the contemporary understanding of the role of human rights. The second claims that it confounds issues of ideal and non-ideal*

theory. I claim that both these criticisms have considerable weaknesses and strengths. Their weaknesses are that they both fail as direct criticisms of Rawls's theory. The first seemingly fails to appreciate that Rawls's theory in fact allows for a contemporary understanding of human rights. The second confounds issues of domestic and international theory. However their strength is that in combination they provide an attractive alternative idea of the role of human rights in a theory of international justice.

- v. *Towards the end of the thesis I sketch an alternative theory of international justice. Here I claim that by including representatives of all domestic societies in the world in the same original position, modelled as representatives of liberal peoples, a theory of international justice can provide added normative force to the duty of assistance and human rights.*

These claims guide the argumentative structure of the thesis. However, a sixth, underlining claim is also of particular relevance:

- vi. *There are several differences between a liberal cosmopolitan view and Rawls's view. However, I claim that the actual differences are more precisely understood and appear less extensive if a distinction is made between internal and recognitional legitimacy because, on my understanding, LP is exclusively concerned with the question of recognitional legitimacy.*

1.2.3 Relevance of the Thesis

When addressing issues of global or international justice, LP is a central work for several reasons. Rawls's prominence as an author in political philosophy is an obvious one. The hostile reception from writers that sympathize strongly with Rawls's other works underlines its controversy, which again makes it a useful point of departure for discussion. Its position somewhere between the doctrine of realism in international relations, and that of liberal cosmopolitanism contributes to placing the theory in the eye of the scholarly storm that is the debate on international justice (Martin and Reidy 2006, 6-7).

(...) *The Law of Peoples* has become something of a North Star (...) within many debates central to contemporary political philosophy. In matters of international justice, whatever your understanding of Rawls's position, and whether you're with it or against it, it is one of the pole stars by which you set the course of your argument (Martin and Reidy 2006, 8).

Thus, there should be little doubt regarding the relevance of LP. Whilst the above quote is not sufficiently decisive to explain the relevance of this thesis, the status of LP has some clear repercussions regarding the relevance of a discussion devoted to the analysis of Rawls's theory's central elements. My discussion however, is not of interest simply because LP is of interest, but for several other reasons.

Firstly, although some aspects of LP are clearer than others, Rawls's conception of human rights (despite being of fundamental importance to his theory) cannot be considered one of these. This makes the existence of somewhat different interpretations of Rawls's position possible at the same time. This thesis considers several different understandings of the justification for Rawls's list of human rights in order to provide a more comprehensive answer to the question of whether Rawls's conception of human rights can be plausibly defended. Therefore, not only does this thesis aim to provide new perspective regarding the different arguments inherent within the source text, but also on the different interpretations of Rawls. The assessment of the varying interpretations surrounding Rawls's international theory in this thesis provides an original contribution to the discourse on Rawlsian human rights.

Secondly, an argument could be made that the most important flaw of Rawls's theory is the failure to provide a convincing defence for the idea of duties that apply across borders. Building on this idea I seek to develop an alternative theory of international justice that is compatible with the main judgements of the Law of Peoples. Additionally, it will remain consistent with the idea of an international social contract between peoples as opposed to one between all the individuals in the world. Furthermore the sketched theory can be seen as an attempt to reconcile the liberal cosmopolitan position with the Law of Peoples. This constructive ambition contributes substantially towards differentiating my discussion of LP. It is also arguably the most ambitious part of the thesis.

While this thesis is theoretical in its discussions on international justice, the discussions should be relevant for the real world as well. The discussion of the role of human rights that entail such things as democracy and freedom of speech have taken on even more

relevance in light of the revolutionary wave starting in 2010 that has been called “the Arabic spring”. Furthermore, what I have called the constructive ambition of this thesis, aims to strengthen the normative force behind the claim that rich countries have a moral obligation to help all societies that are burdened in various ways. This includes funding to help them out of poverty and to help establish governments that effectively work on behalf of the citizens and not to enrich the wielders of power. Since current international practices inherent in the international economic system, trade relations or loaning practices might contribute rather than alleviate burdens on poor countries, a part of the moral duty to help these countries is to reform such practices in a way that is fully compatible with the duty to help.

Noam Chomsky and Thomas Pogge (2011) argue that our generation have failed in the struggle for global justice. Furthermore, that while economic growth has accelerated with the globalization of markets after the end of the cold war, this has not benefitted the poor. In fact it seems to have increased the hardships on the already worst off groups. The ever-increasing number of chronically malnourished in the world is a testament to this negative development. To elaborate on the moral duty on rich liberal societies to stop and to turn this development should be an important aspect of political theory that focuses on the international political sphere. It is on the back of these considerations that I hope the theory of international justice that I will go on to sketch in chapter 11 is of more than merely theoretical relevance.

1.3 Cosmopolitanism

On the issue of international justice, different versions of cosmopolitanism are the most obvious alternatives to Rawls’s conception. Pogge (1992, 48-49) writes that all cosmopolitans share three beliefs. The first belief is that “(...) the ultimate units of concern are human beings (...)”. Nations or states are only of moral concern indirectly. The second belief is that “(...) the status of ultimate unit of concern attaches to every living human being equally. The third belief is that “Persons are ultimate units of concern for everyone – not only for their compatriots”.

There are different strands of cosmopolitanism. Moral cosmopolitanism holds that everyone is required to respect each other’s status as ultimate units of moral concern. Legal (or institutional) cosmopolitanism is committed to some form of cosmopolitan global republic where all persons in the world have equivalent legal rights and duties as citizens (Pogge 1992, 49).

The Law of Peoples seems to presuppose that peoples are of moral concern and so it straightaway breaks with a central belief of cosmopolitanism. In practice, cosmopolitans generally criticize Rawls for mainly two things: Firstly, the lack of a more comprehensive principle of global distributive justice than the duty of assistance. Secondly, they criticize Rawls for his arguments in favour of toleration of decent non-liberal peoples. This toleration means that the ideal Society of Peoples, according to Rawls, might be populated by any number of non-liberal decent societies. This thesis focuses exclusively on the latter of these criticisms. I will argue that the Law of Peoples is not incompatible with liberal cosmopolitanism. What I mean specifically is that Rawls's theory is compatible with the overall goal of a world of only liberal democracies. Furthermore, but with certain limitations, the idea that this goal should guide the foreign policy of liberal peoples. In addition it is compatible with the belief political legitimacy demands liberal institutions. Liberal cosmopolitanism might also involve other judgements that are more difficult to reconcile with the Law of Peoples. These are not discussed.

1.4 Aspects Outside of the Scope of this Thesis

The topics of LP entail many debates and my discussion touches on some of these. Certain debates I do not address however. Of these, two related issues are particularly relevant. Therefore, a brief account will be provided below.

The first is the argument that international justice should be addressed through a social contract between states (or peoples) instead of one between all the individuals in the world.⁵ Rawls appears not to give much of an explanation for why he chooses to theorize in terms of peoples instead of individuals. However, by elaborating on what Rawls writes, several others have suggested the underlining reasons for this approach. Wenar (2004, 273) argues that Rawls has to draw on the global public culture to specify legitimate principles of global justice, and that this public culture is dominated by ideas of how states should interact, and not how individuals in different polities should relate to each other. Reidy (2007, 209) argues that Rawls needs to theorize in terms of peoples, because in the real world we live in, there exists different peoples that owe each other recognition and respect.

The second is the claim that in an original position between peoples, the representatives would choose the set of conservative principles of the Law of Peoples as the principles of

⁵ According to Pogge (1994, 197) variants of this approach has been suggested, in addition to himself, by David Richards, Thomas Scanlon, Brian Barry and Charles Beitz.

international justice. Perhaps the biggest question raised here concerns the duty of assistance. This principle only seeks to raise all peoples up to a certain standard where a well-ordered society can be sustained. The question of whether this is a superior principle of distributive justice for the international arena than any other falls outside the scope of my discussion. The most notable of the alternatives to this principle is perhaps an international version of the difference principle. However other principles which lack the “target” and “cut-off point”⁶ of the duty of assistance, could possibly be conceived of. It seems likely that the choice of the duty of assistance is strongly related to the choice of theorizing in terms of peoples. The basis of this assumption is that we might plausibly assume that peoples and individuals have different aims. Although Philip Pettit (2006) questions the logic behind the selection of the duty of assistance, he argues that Rawls’s “ontology of peoples” explains the differing principles of justice between the domestic and global setting. Freeman (2006b, 60) argues that Rawls does not believe the basic structure of international relations gives rise to principles of distributive justice that does not have the cut-off point associated with the duty of assistance. In LP, Rawls (1999b, 117) writes that one of the reasons he rejects a resource redistribution principle is that he believes that “(...) the crucial element in how a country fares is its political culture (...) and not the level of its resources”. This means that “(...) the arbitrariness of the distribution of natural resources causes no difficulty”.

These two points are related because it seems unlikely that a principle like the duty of assistance would be selected in favour of global version of the difference principle in an original position where all the individuals in the world are represented. The reasoning being that there seems to be little reason for why this cosmopolitan approach would produce fundamentally different results than those reached in domestic theory. However, from this it does not follow that the duty of assistance is the most proper distributive justice principle if we favour an international original position over a cosmopolitan. Pogge (1994, 199-205) for instance, argues that a global resource tax system is a superior principle. In my discussion, however, I assume that the duty of assistance is the proper way to deal with questions of

⁶ That the principle has a target and a cut-off point means that once it reaches its goal (that a burdened society becomes well-ordered) no more assistance is required. This means that in a world of only liberal peoples (or in a world of only liberal or decent peoples), there should be no tax on the rich states simply to benefit the poor states.

international distributive justice⁷. Furthermore I assume that Rawls, in LP, is right to populate the original position with representatives of peoples instead of individuals.

1.5 Method

Before I embark on my discussion of LP, the question of how one can make successful normative arguments arises.

In normative ethics, as opposed to for instance the natural sciences, there are arguably no approximately definite standards to which the truth of a normative judgement might be assessed. Logic is obviously an important factor when dealing with any arguments. The conclusions must follow from the premises and the arguments must be consistent without depending on logical fallacies. However, a great deal of logically consistent normative arguments can be made. I might state the premise that no life form has sufficient value to warrant any claims to a certain type of treatment⁸. From this I can make the political normative judgement that there is nothing wrong in how the wielders of power in North Korea act towards the people residing within its borders. However, neither the conclusion nor the premise in this logically consistent statement fits well with the moral convictions of most persons. In the absence of the harder types of evidence provided in physics or in statistical analysis, our own reflections, thus, becomes important to normative reasoning.

While our own reflections about justice and morality should play some role in assessing normative arguments, exactly how this should be done, and whether it can be done in a systematic or even meaningful way is a matter of dispute. One way of going about doing it is by using Rawls's reflective equilibrium approach (Rawls 1999a, 42-45). I think this method has some promise partly because it formalizes and reflects how many people tend to think about normative arguments. In the discussion I will refrain from making more than implied references to it. However, it provides a background to understand how I approach normative arguments.

⁷ This assumption should not be confused with the assumption that the representatives in Rawls's second-level original position actually would select the duty of assistance. Rawls explains in some detail why the duty of assistance, with its cut-off point in particular, is to be preferred over cosmopolitan egalitarian principles. However, his justifications for why the duty of assistance would actually be selected in his international original position are unconvincing.

⁸ One could of course interject here and say that I am stating a false premise. How we know that any premise in moral philosophy is false, however, is exactly the issue at hand.

For Rawls how justified one is in one's political convictions depends on how close one is to achieving *reflective equilibrium*. (...) [I]n reflective equilibrium one's specific political judgements (e.g., "slavery is unjust," "imprisonment without trial is unjust") support one's more general political convictions (e.g., "all citizens have certain basic rights") which support one's very abstract beliefs about oneself and one's world (e.g., "all citizens are free and equal"). Viewed from the opposite direction, in reflective equilibrium one's abstract beliefs explain one's more general convictions, which in turn explain one's specific judgements. (Wenar 2008, section 2.4)

Therefore reflective equilibrium can be defined as a state of balance among a set of beliefs on different levels. The state of balance is only half of the point however. As a method, the careful back and forth deliberation of beliefs on every level move the different beliefs in the direction of a reflective equilibrium. Sometimes we might adjust our judgements if we are presented with an especially intuitively plausible theory, and sometimes our judgements leave us to reject or, if possible, adjust the theory (Rawls 1999a, 42-43).

A practical example of how to use the idea of reflective equilibrium might be helpful here. For instance, assume that I believe freedom is the only relevant parameter for justice. From this I make the political judgement that a state should only interfere in a person's life when such interference is needed to stop that person from interfering in some other person's life⁹. However, I also believe that no person should be enslaved, even under consent. These beliefs may conflict, because in a society that follows the idea of non-interference, where there is no tax and no redistribution, some person could become so poor that they have to choose between, formally or de facto, selling themselves as slaves or suffer starvation or perhaps even die. Assuming this is true, I am left with several choices. I could discard my belief that no person should be enslaved. Another possibility is to adjust my belief about non-interference. Assuming that even consenting slaves, or people under similar hardship are not free in any meaningful understanding of the word, I can instead state that the political system that best maximizes freedom is the most just. Then, on more reflection, I might discover new beliefs potentially conflicting with this new statement. Again I might make some adjustment. By carefully applying this method, I might at one point give up the theory that freedom is the only relevant parameter for justice. Hopefully I will at some point achieve something close to the desired balance between the beliefs I have on different levels.

Reflective equilibrium provides nothing approaching definite truths on normative question however; because once we move beyond the most obvious aspects of normative

⁹ My description here is a sketched representation of common libertarian views, elaborated on by for instance Nozick (1974).

consensus (If indeed there are any) there will be reasonably widespread differences in intuitions. In the end any normative argument must be evaluated by considering its full logical and normative implications as well as the empirical premises it might rest on. Moreover, by making careful judgements on whether these implications are intuitively implausible, in some way conflicts with what we believe to be empirical facts, or are logically inconsistent. It is the act of clarifying all the implications and premises of normative arguments and the act of making careful judgements on them I take to be the general meaning of doing analysis in the field of normative political theory.

While logic and beliefs about empirical facts might be easier to express more certainty around, the deeming of something as intuitively implausible will always be the cause of debate. However, when all the implications of an argument are clarified, it is easier to make a reasonable judgement¹⁰. In the classic science fiction novel *Starship Troopers* (1959) by Robert A. Heinlein, moral philosophy has (given the genre perhaps surprisingly) a central role. Moral philosophy is taught in classrooms as an exact science, on par with mathematics. There appears to be perfect consensus on the premises which moral truths rests upon. Therefore it is telling, that the plot mainly revolves around an interplanetary war between humans and giant bugs. The idea of a consensus around normative judgements appears more at home in science fiction than it is in the real world. Some assumptions and some intuitions are unlikely to reach anything resembling universal agreement in the foreseeable future. Furthermore, consensus is perhaps not a precise judge of truth.

I will at several points in my discussion appeal, both implicitly and explicitly, to normative intuitions. When I do, it is with the hope that at least the people who relate to the general approach and conclusions in Rawls's theories would, on reflection, tend to agree with these intuitions. No doubt some (perhaps even most) would nevertheless disagree. The likelihood of complete agreement remains low. However, with more systematically construed positions, the discussion becomes easier and hopes of reaching a consensus increase. Furthermore, while consensus would be nice, it is also nice to know exactly what the disagreement is about. Consequently, even if it is impossible to fully justify some normative judgements, normative analysis can have a great deal of value.

¹⁰ It is worth noting that clarification is no trivial task. Making an illuminating observation about an implication of an argument or theory, or making an important distinction, might require great reflective effort and creativity, and change how an argument is looked upon.

1.6 Structure

There is a need to briefly go through how the rest of this thesis is structured. Chapter 2 provides a summary of the main points of LP. Chapter 3 gives an outline of Rawls's list of human rights. Chapter 4 considers an interpretation of Rawls that says that the list of human rights must be acceptable to societies that reject liberal beliefs such as the idea that all individuals should be treated as free and of equal moral worth. Chapter 5 discusses an account of Rawls's fundamental norm of legitimacy, which entails that there is political legitimacy in decent societies and therefore such societies should be tolerated. Chapter 6 discusses Freeman's justification of Rawlsian human rights, which is grounded in the idea that the representatives in the second-level original position should be modelled as exclusively rational self-interested. Chapter 7 takes a closer look at Rawls's arguments for toleration of decent peoples and identifies Rawls's valuing of the self-determination of a people as central. Chapter 8 discusses Reidy's proposed justification of Rawlsian human rights. Reidy argues that it would be unreasonable of liberal peoples to endorse a human rights principle that legitimizes the use of forceful intervention¹¹ in decent societies. Chapter 9 discusses the assumption that the human rights principle should take on the role of specifying when forceful intervention is in principle allowed. Chapter 10 argues that liberal cosmopolitan views are not as contradictory to the Law of Peoples as some suggest. In Chapter 11 an alternative theory of international justice is sketched. This theory provides added normative force to the idea of positive duties across borders. Furthermore, it combines some liberal cosmopolitan intuitions with the general approach and main judgements in LP.

¹¹ By "forceful intervention" Rawls (1999b, 80) means primarily diplomatic, economic or military sanctions. I will use the terms "forceful intervention" and "coercive sanctioning" synonymously.

2 The Law of Peoples

In the introduction I gave a brief account of LP. In this chapter I give a fuller introduction of all the central features of the theory presented in this book.

In LP Rawls develops what he believes are the ideals and principles of a liberal foreign policy (Rawls 1999b, 10). He does this by envisioning a hypothetical social contract in a fashion that is similar to how he arrives at principles of justice for a domestic society. Rawls uses the term “Society of Peoples” to describe the group of peoples that follow the ideals and principles of the Law of Peoples (Rawls 1999b, 3).¹²

2.1 The Fact of Reasonable Pluralism

The Law of Peoples extends several of the ideas in PL to the international sphere. Central to this theory for a liberal domestic society is what Rawls calls “the fact of reasonable pluralism”. This is the fact that the diversity of reasonable comprehensive doctrines found in democratic society is not something that is going to disappear. Rather it is something permanent to modern democracy (Rawls 1993, 36). The fact of reasonable pluralism is also central to LP, although in a slightly different version. For my purposes there is a need to look closely at Rawls’s definition in PL:

[I]t is the fact that among the views that develop [under free institutions] are a diversity of reasonable comprehensive doctrines. These are the doctrines that reasonable citizens affirm and that political liberalism must address. They are not the upshot of self- and class interest, or of peoples’ understandable tendency to view the political world from a limited standpoint. Instead they are in part the work of free practical reason within the framework of free institutions. Thus, although historical doctrines are not, of course, the work of free reason alone, the fact of reasonable pluralism is not an unfortunate condition of human life (Rawls 1993, 36-37).

In his international theory, Rawls uses an analogue to the reasonable pluralism of his domestic theory. Since there might be some non-liberal domestic societies that are decent enough to warrant the recognition as equal participating members of the Society of Peoples, toleration of such peoples in international theory might be seen as an international extension

¹² See footnote 3.

of the use of reasonable pluralism in domestic theory (Rawls 1999b, 18, 40). The two cases are, however, not strictly speaking analogues. First, decent peoples are not reasonable, since they do not treat their members as free and equal (Rawls 1999b, 74, 83). Second, that some domestic societies are not going to be liberal, does not seem to be something one would consider a permanent fact of human life. The need to accommodate an international theory according to Rawls's international version of reasonable pluralism, then, is not as pressing as in domestic theory. Rawls seems to acknowledge this, evident via the use of the term "similarly", instead of "analogously" (Rawls, 1999b, 59). He also argues for the belief on the part of liberal societies that decent societies are capable of reforming in a liberal direction, which indicates that he does not hold that the existence of decent peoples have the same kind of permanency as the case may be with reasonable pluralism in a domestic society (Rawls 1999b, 62).

2.2 The Principles of International Justice

The principles of the Law of Peoples are the following:

1. Peoples are free and independent, and their freedom and independence is to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime (Rawls 1999b, 37).

Similarly to how principles are arrived at in domestic theory, Rawls argues that the representatives would endorse these principles when set in an original position under a veil of ignorance. As mentioned earlier, in international theory it is not persons that are represented in the original position(s), but peoples. The term people, is used by Rawls signifying an idealized version of states. On a general level they are synonymous to states, they are set within the international system of states, and they constitute a domestic society like a state.

The representatives in the original position(s) are only presented the list of principles above. They are not offered any alternatives. The debate in the original position is therefore only concerned with the interpretation of the different principles (Rawls 1999b, 40). Rawls gives no reason for why alternatives are not considered. However, he states that he does not believe the representatives would want to remove any principles nor add any. Concerning justice in international relations, he states that he believes these principles to be superior to any others (Rawls 1999b, 41). This, of course, might be the reason why they are selected. However, the lack of alternatives is puzzling. One plausible interpretation is that Rawls does not think that any other principles are viable even as alternatives, because regarding how peoples relate to justice in their relations, no other principles are conceived of. As mentioned, Rawls also thinks that given the nature of peoples, these principles, better than any others, reflect international justice.

2.3 Toleration of Decent Peoples

Rawls uses the international original position twice. First for liberal peoples, because it is, after all, the principles of a liberal foreign policy Rawls wants to elaborate on. The Law of Peoples, however, holds that decent non-liberal viewpoints exist, and that questions concerning to what extent non-liberal peoples should be tolerated is “an essential question of liberal foreign policy” (Rawls 1999b, 10).

The reason we go on to consider the point of view of decent peoples is not to prescribe principles of justice for *them*, but to assure ourself that the ideals and principles of the foreign policy of a liberal people are also reasonable from a decent nonliberal point of view. (Rawls 1999b, 10)

The reasoning, then, behind extending a second original position to decent peoples, is that they are worthy of the recognitional legitimacy that is membership of the Society of Peoples. Whether, internally, the wielders of power in such societies are morally justified in enforcing their laws, seems to be another question. However this distinction will be discussed in greater depth further into this text. Here I only note that while Rawls argues that decent peoples are worthy of being tolerated as equal participating members of the Society of Peoples (Recognitional legitimacy) he does not say that they meet any standards of legitimacy

from an internal point of view (Internal legitimacy)¹³. In fact he seems to imply the opposite, by observing that decent societies are not internally just (Rawls 1999b, 62)¹⁴.

2.4 Characteristics of Five Different Domestic Societies

Rawls (1999b, 4) distinguishes between five types of domestic societies. These are reasonable liberal peoples, decent peoples, outlaw states, societies burdened by unfavourable conditions and benevolent absolutisms. As is revealed by Rawls's choice of words in the above distinction, only some societies qualify as peoples. As noted earlier, the term "people" is therefore not only descriptive, as the case might be with the term state, but it also contains moral content. A people, as opposed to a state, does not have an aggressive foreign policy, and there are certain restrictions on how a people might deal with its members (Rawls 1999b, 25-26). Only the first two categories of domestic societies seem to qualify as peoples.

According to Rawls (1999b, 23-24), liberal peoples have three basic features. Firstly, a liberal people have a reasonably just constitutional democratic government. This means that the government is under the political and electoral control of the people, and protects their fundamental interests. Secondly, they have citizens united by common sympathies. Thirdly, liberal peoples have a moral nature, which requires a firm attachment to a political moral conception of right and justice.

Decent non-liberal peoples are not internally just from a liberal perspective because they fail to treat all persons in society as truly free and equal (Rawls 1999b, 60). A decent non-liberal people may have its institutions organized around a single comprehensive doctrine. The state religion might for instance be the ultimate authority within society (Rawls 1999b, 74). Furthermore, minorities may be excluded from the right to hold higher political or judicial offices. They are not however, stripped of civic rights (Rawls 1999b, 76). Decent peoples do not have aggressive aims in their foreign policy. Furthermore, they allow for dissent; a factor Rawls thinks could contribute to reform over time (Rawls 1999b, 61). The members are allowed a part in the making of political decisions by the use of a consultation

¹³ The very useful distinction between internal and recognitional legitimacy is taken from Allen Buchanan's book *Justice, Legitimacy and Self-Determination* (2004). The distinction is elaborated on by Buchanan in chapters five and six of that book.

¹⁴ One could perhaps object that this point is dependent on the interchanging use of the terms justice and legitimacy. This is a valid objection because internal legitimacy might be present even when laws are unjust. Although it seems natural to assume that they are connected, the two terms are not synonymous. I discuss this issue in chapter 5.

hierarchy or its equivalent (Rawls 1999b, 61). This is far from a democratic institution, but seems to be an instrument for securing feedback between members and the wielders of power. Through such an institution, all groups in society are represented, and the government consults these representatives (71-2).

The system of law in a decent society must follow a common good idea of justice that takes into account what it sees as the fundamental interests of everyone in society (65, 67). It seems that for such a criterion to be fulfilled, a reasonably large proportion of the individuals within the society must subscribe to this common good idea of justice. However, it also seems likely that there would exist a significant proportion that object to laws designed to restrict free speech, deny them access to certain positions and the lack of democratic institutions.

Lastly, a decent people respects and honours Rawls's chosen list of human rights. Rawls is widely criticized for not demanding more than his outline of decency for toleration. At the heart of this criticism lies Rawls's list of human rights.

Decent peoples may come in many different institutional forms. Rawls mainly discusses decent hierarchical peoples. Such peoples have in common that they are associationist in form. This means that the members are viewed as belonging to different groups and "(...) each group is represented in the legal system by a body in a decent consultation hierarchy" (Rawls 1999b, 64). Rawls (1999b, 75-78) lets a hypothetical example of such a society, called "Kazanistan", illustrate that a certain type of Islamic political society is consistent with this type of decent society. Presumably he does this to relate the abstract idea of a decent hierarchical society to the real world. It may be that such a society has similar institutional features to the contemporary state of Iran. However, Iran does not respect Rawls's list of human rights (UN News Service 2011). Furthermore Iran could perhaps also be said to have an aggressive foreign policy. Another state, which seems to bare similarities to a decent hierarchical people, is China. Although there might be several issues here as well. In any case, the question of whether or not Rawls would think China or Oman qualifies as a decent people is not one I wish to pursue. Moreover, it is irrelevant for Rawls whether decent peoples exist or not. His only claim is that if they exist, liberal peoples should tolerate them.

In addition to well-ordered decent or liberal peoples, Rawls describes outlaw states and burdened societies. The former type of regimes might engage in war, if war is seen to advance the interests of the regime (Rawls 1999b, 90). The latter signifies societies that are burdened with unfavourable historical, social and economic circumstances, which make achieving a well-ordered society very difficult (Rawls 1999b, 90, 106). Rawls uses little time

on benevolent absolutisms, other than noting that they honour human rights, but are not decent or well-ordered because they deny their members a role in the political processes (Rawls 1999b, 63). It might be unlikely that such regimes exist or could exist, however the definition of such regimes helps with narrowing-in on the concept of decent societies. It becomes clear that even societies that can honour all the principles of the Law of Peoples should not always be tolerated. The members of a society must also have a part in political decisions for it to be considered decent and worthy of equal membership of the Society of Peoples.

2.5 Just War and the Duty of Assistance

While decent and liberal peoples are included in ideal theory, burdened and outlaw states as well as benevolent absolutisms are addressed in non-ideal theory. Outlaw states that violate human rights, might be met by coercive intervention by use of diplomatic, economic or, in grave cases, military sanctions (Rawls 1999b, 81). Outlaw states acting aggressively, might be subjected to the use of war. The members of the Society of Peoples have a right to use war in self-defence (Rawls 1999b, 91). Rawls outlines a “just war doctrine” with six basic principles. Among these principles is that the aim of a just war is a “(...) just and lasting peace among peoples, and especially with the people’s present enemy” (Rawls 1999b, 94). Furthermore, that just war is only waged against expansionist states that threaten the security and freedom of well-ordered peoples (Rawls 1999b, 94).

Burdened societies are to be supported in their development with the goal of sustainment of decent or liberal institutions. This is specified by the duty of assistance:

(...) [I]ts aim is to help burdened societies to be able to manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples. This defines the “target” of assistance. After it is achieved, further assistance is not required, even though the now well-ordered society may still be relatively poor.

The only reason Rawls provides regarding why the duty of assistance would be endorsed in the original position is his stipulation that one of the characteristics of liberal and decent peoples is their concern of extending the Society of Peoples to all domestic societies (Rawls 1999b, 89). Rawls (1999b, 29) also writes that one of the interests of liberal peoples is to try “(...) to assure reasonable justice (...) for all peoples”. Rawls assumes this concern is

strong enough to warrant the inclusion of the duty of assistance among the selected principles. This seems a rather feeble defence for such an important and progressive part of Rawls's theory. The problem for the duty of assistance principle is that the interests of burdened societies are not represented in the original position. This means that Rawls has to rely on the assumption of the benevolence of liberal (and decent) peoples in order for the duty of assistance to be selected. However, there seems to be little evidence that this level of benevolence is a significant feature of developed societies¹⁵.

¹⁵ The problems related to the selection of the duty of assistance is addressed further in sections 3.5 and 11.1.

3 Rawlsian Human Rights: An outline

In this chapter I outline Rawls's conception of human rights in LP. First I note the centrality of human rights in Rawls's international theory. Second, I note the lack of a clearly stated justification for his proposed list of human rights. Third, I give a quick overview of the content, nature and role of Rawlsian human rights. Fourth, I comment on the relationship between the human rights principle and the duty of assistance and discuss how broadly the latter principle could be interpreted. Lastly I show that Rawls's use of an original position argument to derive the principles of international justice, fails to provide any added normative force to the idea of universal human rights as well as duties across societies.

3.1 The Centrality of Human Rights in Rawls's Framework

The sixth of the eight principles of the Law of Peoples reads: "Peoples are to honor human rights" (Rawls 1999b, 37). The principles, as Rawls (1999b, 37) points out are "(...) familiar and traditional principles of justice among free and democratic peoples". In light of their familiarity, none of the principles are especially controversial. Except perhaps, again as pointed out by Rawls (1999b, 37n), the duty of assistance to peoples living under unfavourable conditions. This is not to say that Rawls's decision to present exactly these, seemingly conservative rules of international relations, as the chosen principles for global or international *justice*, is uncontroversial. Critics, perhaps of the more cosmopolitan persuasion, might both dismiss the principles chosen in the original position as too restrictive. For instance lacking a proper parallel to the domestic difference principle, as well as disagree with the decision to theorize in terms of states and not individuals, in the first place¹⁶.

Be that as it may, the most common controversy with these familiar principles, upon the acceptance of their presence, is the means by which some are interpreted. This way, the human rights principle becomes important, as it forms the restrictions on the other principles. This way, the role of human rights permeates Rawls's framework. First it forms part of the "(...) limits on, a government's internal sovereignty" (Rawls 1999b, 27). This means that the list of human rights place the limits on what the international community should accept that a government could subject its members to. Rights to independence and self-determination,

¹⁶ For an account of the first criticism see for instance Thomas Pogge (1994). For an account of the second, see for instance Simon Caney (2002).

which follow from the first principle, is qualified by the honouring of human rights. Second and also related to the first, human rights make qualifications on the fourth principle of the Law of Peoples, which states that: “Peoples are to observe a duty of non-interference” (Rawls 1999b, 27). Exceptions on this principle, such as measures involving diplomatic, economic, or in grave cases, military sanctions are only ruled out against societies that honour human rights. Similarly, the right to self-defence, specified in the fifth principle, is only a right for non-aggressive, human rights-honouring societies (Rawls 1999b, 92).

3.2 Rawlsian Human Rights: Thin Justifications

Since human rights are so important to Rawls’s theory, one would naturally expect that Rawls would go into great detail on their nature and justification. The rights Rawls considers proper human rights, does not include seemingly important rights such as equal political participation, freedom of speech and non-discrimination (Rawls 1999b, 65, 80n). Instead he calls such rights liberal aspirations (Rawls 1999b, 80n). Given the centrality of the human rights that are seen by Rawls as proper, and the significance of the cut he makes between proper and non-proper human rights, a thorough justification is seemingly essential. Somewhat surprisingly Rawls remains both vague and brief on the subject. A much-cited paragraph in the literature surrounding LP, which point to the difficulty of writing about Rawls’s view on and use of human rights is the following comment from Rawls (1999b, 27):

At this point I leave aside the many difficulties of interpreting these rights and limits, and take their general meaning and tendency as clear enough.

Furthermore, Rawls never attempts to explain why for instance freedom of speech is merely an aspiration, instead of a proper human right. Since Rawls is elusive on his justifications, his position sometimes becomes difficult to criticize, because it is difficult to approach.

Now, Rawls is not completely silent on the matter, so the prospects of writing about human rights in LP is not as bleak as I perhaps have made it out to be. However, I find it relevant to make these comments before I proceed because it partly explains why my discussion is as focused on the interpretations of Rawls in the literature surrounding LP, as it is on LP itself. Since Rawls is at best ambiguous on his justifications, it becomes necessary, when discussing Rawlsian human rights, to at least in part use different interpretations of Rawls as a basis for the discussion. Furthermore, it is presumably because of the lack of a

clear justification for his conception of human rights, that the literature surrounding LP include various attempts, at elaborating on Rawlsian human rights on Rawls's behalf.¹⁷

3.3 Rawlsian Human Rights: A Quick Overview

The Law of Peoples endorses a somewhat narrow, or basic, doctrine of human rights. Rawls (1999b, 78) holds that human rights are different from the political rights that citizens have in a reasonable constitutional democratic regime. Instead they “(...) express a special class of urgent rights (...)” (Rawls, 1999b, 79). At one point Rawls (1999b, 65) lists the following as human rights:

(...) [T]he rights to life (to means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).

Note here that while these Rawlsian human rights endorse freedom of conscience, those that believe otherwise than the wielders of power might be discriminated against holding certain positions. Rawls (1999b, 65n) calls this “(...) liberty of conscience, though not an equal liberty”. In fact, there are no human rights, according to Rawls, protecting against various forms of discrimination on grounds of for instance nationality, sexual orientation, ethnicity, gender, or race (Buchanan 2006, 151).

The distinction between the typical rights of citizens in constitutional democracies and rights that Rawls allows as human rights in the Law of Peoples are made clearer by a brief discussion in a footnote that I have already made references to. Here, by reference to the Universal Declaration of Human Rights of 1948, Rawls (1999b, 80n) makes a distinction between human rights proper, and what he calls statements of liberal aspirations. He writes that article 3 to 18 in this declaration might be seen as human rights proper. Notably omitted from Rawls's list of human rights then, is a right to democratic participation, freedom of speech, and non-discrimination.

A look at the index in LP reveals the following points made by Rawls on the nature of human rights of the Law of Peoples: 1. They do not depend on a comprehensive or liberal doctrine. 2. They consist of a special class of urgent rights. 3. They are universal in reach. 4.

¹⁷ In this thesis I discuss primarily such contributions from Buchanan, Freeman, Wenar and Reidy.

They are necessary to any system of cooperation. 5. They are not the same as liberal democratic rights. Furthermore, Rawls (1999b, 80) writes that his class of human rights have the following three roles:

1. Their fulfilment is a necessary condition of the decency of a society's political institutions and of its legal order (...).
2. Their fulfilment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
3. They set a limit to the pluralism among peoples.

These roles will be central to this thesis because the justification of Rawls's list of human rights must be seen in relation to its role.

3.4 Some Comments on the Duty of Assistance

As mentioned at one point in the introduction, the duty of assistance is related to the human rights principle. The reason for the connection is that the minimal level the duty of assistance seeks to raise burdened societies to (decency), is one where Rawls's list of human rights is respected and honoured. This way the duty of assistance (at least indirectly) protects human rights.

An often criticised aspect of contemporary liberal countries' foreign policy is their frequent exploitation of less developed countries in order to enrich themselves¹⁸. Pogge (2006, 221) argues that one of the main differences between his view and Rawls's is that Rawls in effect criticizes contemporary rich liberal countries for failing to fulfil their positive duties of assistance, while Pogge on the other hand:

(...) [C]riticize rich liberal societies (and the ruling elites of many poor countries) for massively violating their negative duties not to harm by imposing a global institutional order that foreseeably causes avoidable human suffering of unimaginable proportions (Pogge, 2006, 221).

Although I sympathise with Pogge's statement I wonder if his interpretation of Rawls is too harsh¹⁹. If the current global institutional order is as unjust and exploitative of the least advantaged societies as Pogge claims, then it seems to be incompatible with the duty of

¹⁸ See for instance Pogge (2002).

¹⁹ Freeman (2006a, 249-251) makes a similar observation.

assistance. Rawls does not say much about fairness concerning the many aspects of trade relations and the international economic system. However, if we assume that all rich liberal societies were to accept the duty of assistance with its goal of helping burdened societies to the level of well-ordered (a level where there is no substantial human suffering), then they would have to do something as well with the harmful global institutional order (assuming Pogge is right that it is harmful). The duty of assistance would be a hollow and largely ineffective principle if rich countries are allowed to give with one hand and take with the other the way Pogge describes. If the duty of assistance indeed implies negative duties as well as positive duties, then Pogge's position is perhaps not as far from Rawls's as he assumes.

I have already noted briefly that Rawls does not provide a compelling justification for the inclusion of the duty of assistance amongst the principles. Part of my argument for this claim is elaborated on in the next section.²⁰

3.5 Human Rights, the Duty of Assistance and the Original Position: Absence of Added Normative Force

When presented with Rawls's original position-derived principles of international justice, two fundamental questions concerning the human rights principle tends to open up. Curiously they lead the discussion in entirely contrasting directions. The first raises the issue of why the list of rights is not more extensive. The second however, questions why a list of human rights is selected at all.

Unsurprisingly, a continual criticism of Rawls's list of human rights is the argument that they should include more rights. By reflecting on the original position argument that Rawls uses to derive his principles of international justice, one might say that since liberal peoples decide the principles of the Law of Peoples, it seems likely that they would agree on a more liberal list of human rights. In Rawls's domestic theories however, representatives of individuals are modelled as rational and self-interested (Rawls 1999a, 123). What principles then, we might ask, would follow from an original position populated by representatives of peoples only concerned with pursuing their own rational interests?²¹ M. Victoria Costa (2005, 51-52) argues that given the self-interests of peoples, many of the principles in the Law of

²⁰ I elaborate more on this point in chapter 11.

²¹ Freeman's defence of Rawls relies on this understanding on the use of an international original position to derive the principles of international justice. This defence is discussed in chapter 6.

Peoples are plausible. Except for principles six and eight, which includes the human rights requirement and the duty of assistance²². The representatives in the original positions know that they represent liberal or decent peoples. Therefore they know that the human rights of their own members are catered for. Nothing inherent in or attributable to the use of an original position argument is suggesting then, that the representatives of liberal peoples would select the human rights principle or the duty of assistance (Costa 2005, 55).

Even if the original position in itself does not lead to the human rights principle and the duty of assistance, we might plausibly assume that liberal (and decent) peoples are of such a nature that they would care about the rights of individuals in other societies and therefore endorse a human rights requirement. This assumption however, leaves the “(...) explanatory and justificatory power of the original position (...) trivial”(Costa, 2005, 55). Since the principles are not the result of the use of the original position, but rather the assumptions of the benevolence about the involved parties, the human rights requirement and the duty of assistance is given no added normative force by the fact that they are selected in an original position (Costa 2005, 54).

To clarify what is meant by “added normative force”, I find it helpful to make a parallel to TJ. For instance, assume that I am sceptical of egalitarianism. If I accept the use of a Rawlsian social contract to decide the principles of justice, then reading TJ might convince me that my sceptical first intuition was wrong founded, as the second principle of justice plausibly follows from the use of the original position. Conversely, assume that I, a member of a liberal democratic people, do not believe that there exists any duties across societies, or that as long as another society is peaceful to its surroundings, its internal affairs are not of any concern for the people I myself belong to. Even if I endorse the use of the original position as it is used in LP, reading Rawls’s theory of international justice will provide me with no reason to reconsider my position. I will still reject the human rights requirement and the duty of assistance.

At first this point may seem trivial, as arguably most people believe we should care about the rights of individuals in other states, and that we should help individuals in other states to achieve at least a minimum standard of living. However upon consideration, perhaps there is more depth to the point that warrants further consideration. Consider for instance the

²² Several others make similar remarks. Alistair Macleod (2006, 142) for instance argues that a people-populated original position is not well suited to deriving a human rights principle. Pettit (2006, 54) notes that positive duties make up the weakness of Rawls’s international theory. Pogge (2006, 212) notes that Rawls does not explain why the representatives would choose the duty of assistance principle.

fact that hunger is by far the number one health risk worldwide and kills more people every year than AIDS, malaria and tuberculosis combined (World Food Programme 2012). Furthermore the fact that the cost of addressing this and similar problems related to very basic human rights would be relatively insignificant on advanced societies. That these problems persist and even deepen, suggests that providing arguments (as opposed to assumptions) in favour of a human rights principle and duties of assistance, should be an integral part of constructing a theory of international justice.

If the original position provides the argument for the principles, then the selection of the human rights principle and the duty of assistance seems about as plausible as the assumption that Rawls's first and second principle of justice from TJ would be chosen in a domestic original position where only representatives of the best-off group of society were represented. Obviously, there might be certain assumptions one can plausibly attribute to liberal peoples, which explains why the human rights principle would be chosen in the original position²³. However my point has been that since Rawls depends on assumptions on the benevolent characteristics of the represented actors, his theory provides no added normative force to the human rights principle or the duty of assistance.²⁴

In the next chapter I begin my discussion of whether Rawls's list of human rights can be plausibly defended. Here I consider a common liberal criticism of Rawls, namely that he relies on an argument from moral relativism, which says that a list of human rights must be acceptable to decent peoples that reject the liberal idea that all individuals should be treated as free and of equal moral worth.

²³ In chapter 6 I argue that it is plausible to assume that liberal peoples would endorse a human rights principle, because liberal peoples believe all domestic societies should respect human rights. In chapter 11 I argue that the duty of assistance is more problematic in this respect because it implies duties, while the human rights principle does not.

²⁴ The fact that Rawls's original position argument for principles of international justice provides no added normative force for the duty of assistance is the main reason for why I attempt to sketch an alternative theory of international justice in chapter 11.

4 Rawlsian Human Rights and Rawlsian Tolerance

Rawls (1999b, 68) writes that the list of human rights he describes in LP can be accounted for in two ways:

One is to view them as belonging to a reasonably just liberal political conception of justice and as a proper subset of the rights and liberties secured to all free and equal citizens in a constitutional liberal democratic regime. The other is to view them as belonging to an associationist social form (as I have called it) which sees persons first as members of groups – associations, corporations, and estates.

However, what is the significance of the fact (if it indeed is a fact) that his list of rights can be seen as belonging to an associationist social form? For example, does this fact provide the reason for why the list is only a limited subset of the rights and liberties of a liberal democratic regime when it is viewed as belonging to a reasonably just liberal political conception of justice?

In this chapter I discuss the claim by Rawls that a list that is not acceptable to the associationist moral beliefs of decent peoples, would be illegitimate. Instead Rawls argues that liberal peoples should tolerate decent peoples, and presumably therefore only apply a narrow doctrine of human rights. One of Rawls's arguments for why liberal peoples would choose to tolerate decent peoples is based on the idea of reasonable pluralism, which liberal peoples, according to Rawls, would apply wider in the international than the domestic setting.

4.1 Tolerance for “Not Fully Unreasonable” Pluralism

The justification of Rawls's list of human rights I discuss in this chapter combines three elements of Rawls's thinking to provide a defence for his narrow conception of human rights. These elements are the following: First, the fact of reasonable pluralism. Second, the criterion of reciprocity. Third, the stipulation by Rawls that decent peoples are not fully unreasonable.

The idea of reasonable pluralism is central in PL. The Law of Peoples extends this idea to the international realm. Rawls's view of reasonable pluralism entails the criterion of reciprocity.

The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must think it at least reasonable for others to accept them (...). Citizens will of course differ as to which conceptions of political justice they think the most reasonable, but they will agree that all are reasonable, even if barely so (Rawls 1999b, 136-137).

For the purposes of international theory, “citizens” in the above quote might presumably be substituted with “peoples”. To tolerate reasonable pluralism then is to act according to the criterion of reciprocity. This criterion (or norm) is, according to Rawls, a central feature of liberal thinking. Rawls (1999b, 74, 83) does however admit that decent peoples are not reasonable because they do not treat their members as free and equal. Therefore it seems that the conception of justice that underlines the political system in decent societies is not reasonable. Consequently, decent peoples’ reasons for rejecting human rights that ensures non-discrimination, equal participation and freedom of speech are not strictly speaking reasonable. However, Rawls (1999b, 74) finds space for his account of decent peoples “(...) between the fully unreasonable and the fully reasonable”. The stipulation by Rawls, that decent peoples are not fully unreasonable, leads Allen Buchanan (2006, 154) to dryly point out that in LP it is seemingly the fact of “(...) not unreasonable pluralism (...)” that underlines Rawls’s conception of human rights.²⁵

The difference in the implicit use of not unreasonable pluralism in LP and reasonable pluralism in PL signals an important lack of parity in the role of the term “reasonable pluralism” between the two theories. If Rawls’s domestic theory stipulated that political liberalism should tolerate pluralism that is not fully unreasonable, then presumably the democratic society this theory is meant for would not any longer be allowed to be democratic. This does not necessarily mean that Rawls falls prey to a theoretical inconsistency. There might be differences between international society and a domestic democratic society that warrants the lack of parity. Rawls suggests one when he writes that there is an even greater plurality of comprehensive doctrines in international society than within a constitutional democracy (Rawls 1999b, 40,18).

If a reasonable pluralism of comprehensive doctrines is a basic feature of a constitutional democracy with its free institutions, we may assume that there is an

²⁵ Even Buchanan’s comment might be charitable on Rawls as there is a difference between “not unreasonable” and “not fully unreasonable”, the latter being seemingly more inclusive. I will use the latter, since it mirrors what Rawls writes.

even greater diversity in the comprehensive doctrines affirmed among the members of the Society of Peoples with all its many different cultures and traditions (Rawls, 1999b, 40).

This might be true, although I suspect some multicultural modern democracies have representatives for virtually any culture in the world within its borders. In any case, the fact that the international society is more pluralistic than a domestic one hardly justifies making concessions on principles of international justice. The fact (if it is a fact) that international society is more pluralistic than any domestic society merely highlights that some societies have intolerant and oppressive laws.

Rawls (1999b, 68) holds that his list of human rights: “(...) do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature”. For example, the assumption that all human beings are of equal moral value would seemingly be to rely on such a doctrine. However, according to Rawls (1999b, 68) “[t]o argue this way would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic (...)”. Here Rawls is at least implying that relying on a philosophical doctrine that sees all humans as of equal moral value, when constructing a doctrine of human rights, is illegitimate because the denial of such beliefs by peoples who subscribe to an associationist conception of individual good is not unreasonable (Buchanan 158).²⁶ Rawls’s (1999b, 83-84) argument that decent hierarchical peoples that deny the view of individual good as held by liberalism, deserve to be treated equally to liberal peoples, and should be tolerated, seems to support Buchanan’s interpretation here. Thus, it seems what Rawls is stating is that some non-liberal societies, with an associationist view of individual good, deserve to be tolerated, and therefore liberal peoples can only endorse a list of human rights that decent non-liberal peoples can accept.

This argument from Rawls is problematic. Buchanan (2006, 155-156) points out that it is hardly uncontroversial that the moral beliefs of decent peoples are not unreasonable. And even if they are not unreasonable, it is equally dubious that in order to be tolerant we should modify our list of human rights to accommodate such not unreasonable views.

If the reason why someone can “not unreasonably” reject a human rights norm is that his conception of morality is seriously distorted by indefensible beliefs (of women for

²⁶ Such a view of the individual good does not take basis in the individual, the way liberalism does. Instead it works from an understanding that the basic interests of an individual cannot be specified without reference to the individual’s group-identity (Buchanan 2006, 157).

instance), then it may not be intolerant to impose that norm on him. (Buchanan 2006, 156)

Following a similar line of reasoning, Caney (2002, 102-104) argues that the various practices allowed in decent societies, such as discrimination, shows that decent societies are intolerant. From this he argues that Rawlsian tolerance for decent peoples, contrary to what Rawls claims, is in fact intolerant (2002, 104).

The wielders of power in decent societies deny that persons should be treated as free and equal. It seems unacceptable that such beliefs about morality should constrain the list of human rights. Anyone who denies that this is unacceptable would have to explain why all persons should not be treated as free and equal. This is perhaps *the* central assumption of any form liberalism. It seems strange of course, that liberal peoples would choose principles of international justice that committed them to argue that persons in decent societies should not be treated as free and equal.

4.2 Objectivity and Moral Relativism

At the conclusion of LP Rawls (1999b, 121) poses the question of whether the idea to develop a Law of Peoples from the point of view of liberal societies is ethnocentric or merely western. According to Rawls, it does not need to be, as it largely depends on what the contents of such a law turns out to be. If it can satisfy the criterion of reciprocity and be part of the public reason of a society of liberal and decent peoples, then Rawls believes it could be objective (as opposed to ethnocentrically western). This claim of objectivity however has a rather obvious response. Namely that an even more objective Law of Peoples, without any human rights requirement, would be acceptable to even more societies. This more inclusive Law of Peoples would, of course, be compatible with great injustice and seem unacceptable. However if injustice is the parameter, it also seems to be unacceptable to reject freedom of speech and democratic participation and non-discrimination as human rights. When Rawls uses the word “objectivity”, what he seems to really mean is moral relativism. Furthermore, it is seemingly a type of moral relativism that goes quite deep because it upsets rights that any liberal would deem very important. To consider such rights “merely western”, and furthermore to call the rejection of such rights “objectivity” seems to obscure this fact.

Rawls’s use of reasonable pluralism at the international level would appear to test our commitment to the liberal assumption that all persons should be seen as free and equal when

principles of justice that involve them are developed. What Rawls seems to be arguing with the use of international “not fully unreasonable” pluralism, is that since some peoples would reject this assumption, then for the purposes of international theory, we should reject it as well. It seems unlikely that liberal peoples would agree with Rawls because he asks them to betray their most basic set of beliefs. There might be reasons why it is unreasonable to apply a human rights list that includes liberal rights on non-liberal peoples. In this chapter however, I have argued that the fact that non-liberal peoples deny liberalism as “merely western” is not a reason that is acceptable, least of all to liberal peoples. In this respect Rawls’s extension of toleration for reasonable pluralism to international theory fails.

Leif Wenar has argued that Rawls believes that although decent peoples are internally unjust, they are legitimately governed. This is possible because legitimacy, according to Wenar is a significantly more permissive standard than justice. This might provide a stronger argument for why the list of human rights should be acceptable to decent peoples. Because it seems a sensible claim to say that regimes that are morally justified in enforcing their laws²⁷ should be tolerated. In the next chapter I argue that Wenar is wrong on two dimensions. Firstly, his arguments are unpersuasive because legitimacy is more closely related to justice than he assumes (or argues that Rawls assumes). Secondly, in my opinion, Wenar misconstrues Rawls’s position. I believe this is partly because he misses an opportunity to make the important distinction between internal and recognitional legitimacy.

²⁷ I take internal political legitimacy to mean that the wielders of power in a society are morally justified in enforcing their laws. This, in my view plausible definition, is taken from Buchanan (2004, 233).

5 Leif Wenar's Account of Rawlsian Legitimacy

Leif Wenar (2004; 2006) develops a coherent and unifying interpretation of Rawls's works in general. His understanding of Rawls's stance on international justice and legitimacy is based on the assumption that the principles of the Law of Peoples must be acceptable to the moral views of decent persons, as members of decent peoples. As such it can be seen as a response to some of Rawls's liberal critics. Central to Wenar's interpretation is the issue of legitimacy, which he claims is a more permissive standard than justice. Wenar's reconstruction of Rawls's arguments seeks to understand all of Rawls's theories in a unified way, dispelling critical claims of inconsistencies. Consequently, his interpretation appears clarifying.

There is political legitimacy in decent societies, on Wenar's understanding of Rawls, because it is appropriate to regard the members of a decent society as having decent views. If decent societies are legitimate, so the argument goes, then the Law of Peoples must be acceptable to decent peoples. However, or so I argue, Wenar's account of Rawls seemingly relies on an understanding of legitimacy that is both contextually and conceptually implausible.

5.1 Legitimacy: The Appropriateness of Regarding Persons as Decent

Wenar (2006, 100) argues that Rawls's later work (PL and LP) must be seen in relation to a theory of political legitimacy. This theory of political legitimacy finds its fullest expression in PL. Wenar (2006, 100) derives what he calls Rawls's "fundamental norm of legitimacy" from the liberal principle of legitimacy in PL. Importantly it also involves a significant adjustment that is based on what is written by Rawls in LP. According to Wenar (2006, 100), this fundamental norm is the following:

[T]he exercise of coercive political power over persons is legitimate only when this exercise of power is in accordance with a basic structure that those persons can accept, regarding those persons as either decent or reasonable, as appropriate.²⁸

²⁸ It is important to note that these are Wenar's words. Rawls (1993, 137) only formulates a *liberal* principle of legitimacy in PL. This principle is similar the one quoted here. Importantly it lacks the reference to decent persons. Therefore Wenar's fundamental norm of legitimacy is an adjustment of Rawls's principle of political legitimacy based on what Rawls writes about toleration for decent peoples in LP.

That the liberal principle of legitimacy is reduced in this way to cater for the views of “decent persons” seems problematic, because these views lead to seriously unjust policies. Wenar (2006, 100) writes that legitimacy is a more permissive standard than justice. However whilst this might be the case, nonetheless it is still closely related to justice. A plausible definition of internal political legitimacy is that it rests on whether the wielders of power are morally justified in enforcing their laws (Buchanan 2004, 233).²⁹ This seems to be in line with Rawls’s understanding of the term (Rawls 1993, 136-137). Since moral justification and justice are related, the injustice of laws should always raise deep questions of their legitimacy. However the beliefs of the members of society may be a factor. This raises the question of how the beliefs of the dominant groups of a society relate to the issue of legitimacy.

In a decent society, where there are no democratic institutions and a restriction on free speech, it is difficult to know if the members generally would endorse these laws if they were given the chance to change them. However, for the purposes of this discussion, let us assume that this is not a valid concern. Wenar’s fundamental norm of legitimacy alludes to the intuitive idea that the beliefs of the members of the society in question also are important to the idea of legitimacy. These beliefs might upset the close relationship between legitimacy and justice. However, they are only relevant to a certain extent. For the argument for legitimacy that Wenar attributes to Rawls to be plausible, it is seemingly dependent on all the persons in a decent society having decent views. There will presumably always be reasonable persons within decent societies. These persons might believe that the society should be a liberal democracy. Wenar’s norm of legitimacy begs the question of whether the isolated fact that some reasonable individuals *live* within the borders of decent societies is sufficient ground to think it “appropriate”, to use the decent perspective when assessing the legitimacy of exercising political power over such individuals? It seems implausible in my view that an affirmative answer to this question can be made. However, if we hold that the answer to this question in fact is yes, we are committed to saying that a reasonable person in a decent society that breaks an unreasonable law, for instance one restricting the freedom of speech, can, from a moral perspective, be legitimately sentenced to punishment. I do not think that the popularity of certain beliefs really changes the conclusions of the the last chapter. Laws that violate important liberal rights are not morally justified simply because a significant part of society endorses them.

²⁹ See footnote 27.

Rawls's liberal principle of legitimacy, on the other hand seems a plausible account of legitimacy. This principle states that "(...) our exercise of political power is fully proper when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse (...)". Some might say that a particular dominant reasonable belief within a society might make the laws in this society less just, but legitimate still. For instance, a social democrat might argue that the conservative political majority of the people to which she belongs leads to a lack of justice. However, regardless of whether her assessment is accurate, this does not mean that legitimacy is not present. I think this is a more plausible account of how legitimacy is a more permissive standard than justice than the one inherent in Wenar's argument.

5.2 Legitimate Viewpoints in the Global Political Culture

When Rawls addresses international justice, he must according to Wenar (2006, 102), draw upon the global political culture to find ideas that are acceptable to all. However, the global political culture is mainly international, not interpersonal. This contributes to explaining the use of an original position of peoples instead of individuals. However, the problem is that if the views of decent persons affect the limits of legitimacy, this would presumably mean that the principles chosen in the first second-level original position would have to be acceptable to the moral viewpoints of decent peoples as well as those of liberal peoples. When Wenar writes that Rawls must draw upon the global political culture to find ideas that are acceptable to all, he means acceptable to all decent and liberal persons, and by extension all legitimate peoples. However, as I have argued, in societies where persons with decent viewpoints on morality dominate, political power is not legitimately wielded. If this is so, then there is no reason why Rawls must constrain the human rights principle so that it is acceptable to all decent persons the way Wenar argues.

5.3 Internal and Recognitional Legitimacy: An Important Difference

Legitimacy, according to Wenar (2006, 100), is a more permissive standard than justice. And yet:

(...) [T]he laws of a legitimate basic structure are sufficiently just that it is justifiable to enforce them. Moreover, the laws of a legitimate basic structure are sufficiently just that foreigners may not permissibly intervene to attempt to change these laws. Legitimacy is in this way a primitive concept of normative recognition both for those within and for those outside a basic structure.

This definition of legitimacy equates internal political legitimacy and recognitional legitimacy. This is potentially problematic.

For Rawls (1999b, 67) “[t]he decent common good idea of hierarchical peoples is a minimal idea [of justice]”. While it is an outline of only a minimal idea of justice, its presence in a domestic society is sufficient to warrant recognition as an equal participating member of the Society of Peoples (Rawls 1999b, 67-68). Decency then, is not an outline of internal legitimacy for non-liberal peoples. It is exclusively intended on specifying what it takes for a society to be afforded recognitional legitimacy. I believe there is merit to Wenar’s argument when he states that a theory of legitimacy is central to both PL and LP. However, he assumes too much when arguing that Rawls believes there is internal legitimacy in decent societies. Rawls only states that decent peoples deserve to be *recognized* as equal members of the Society of Peoples. Therefore, the correct assessment should be that while a theory of internal political legitimacy is central to PL, a theory of recognitional legitimacy is central to LP.

Wenar’s interpretation of Rawls fails to provide a convincing defence for his short list of human rights. This is due to legitimacy being closely related to justice and also because it seems questionable to suggest that it is appropriate to view all the members of decent societies as having decent views just because they reside within the borders of such societies. However, since the Law of Peoples focuses exclusively on the issue of recognitional legitimacy, it is only the claim that decency is an appropriate standard for recognitional legitimacy that needs to be defended, not that decent peoples are internally legitimate, as Wenar’s interpretation assumes. On the surface there seems little grounds to suggest that the standards for recognitional legitimacy should not be the same as those for internal legitimacy. However, the distinction between the two types of legitimacy takes on greater relevance in later chapters. The reason why this distinction becomes important is that Rawls provides an argument that can be seen to upset the straightforward grounding of recognitional legitimacy in whether there can be said to be internal legitimacy³⁰.

³⁰ I elaborate on this point in chapters 7 and 8.

It seems that Wenar's fundamental norm of legitimacy does not change the fact that it seems implausible to say that liberal peoples would make concessions on the human rights principle to cater for the beliefs of decent peoples. Furthermore, they are in their rights not to, because the decent point of view on morality is at odds with aspects of justice that are fundamental to internal legitimacy.

5.4 Two Alternative Routes for Other Justifications for Rawls's List of Human Rights

This chapter concludes my discussion of the argument that the human rights principle must be acceptable to the moral beliefs of peoples that deny that persons should be treated as free and equal. I have argued that this is not a compelling argument. Furthermore that invoking a term like legitimacy does not change this fact, even though the dominant groups of society might endorse the laws of the decent polity.

It seems that a defence for Rawls's list of human rights at this point must proceed along one of two alternative routes: It must *either* find an alternative reason (than the moral beliefs of decent peoples) that explains why it would be unreasonable of liberal peoples to impose on decent peoples the rules of a Law of Peoples with a human rights principle that include the human rights Rawls calls liberal aspirations. *Or* it must find a defence of Rawls's list of human rights that is not grounded in the fact of reasonable pluralism or the criterion of reciprocity. I will discuss both routes and start with the latter. In the next chapter I therefore discuss Freeman's (2006b) defence of Rawls's list of human rights.

Freeman, one of Rawls's most dedicated defenders, has provided a justification for why the list of human rights is narrow, and does so without relying on the morally relativistic argument of tolerance for the moral beliefs of decent peoples. As the last two chapters have demonstrated, I am critical of this decency-limited moral relativism. Therefore Freeman's alternative justification offers much promise. Regardless, I will go on to argue that Freeman's defence of Rawlsian human rights fails at three important levels and should therefore be rejected.

6 Freeman: Self-Interested Representatives and the Security Argument

It is possible that Rawls's view is that his list of human rights is simply compatible with an associationist or decent view of the good and not that it is constrained by such a view.

Furthermore, that Rawls believes this strengthens his theory, because those rejecting liberal principles cannot reject it as "merely western". If this is the case then the question that needs answering is how the same list of rights can be chosen in an original position of liberal peoples, regardless of the views and beliefs of decent peoples.

In this chapter, I discuss Freeman's (2006b) justification for why representatives of liberal peoples in the original position would restrict their conception of human rights to the basic list provided by Rawls. This justification is not grounded in any form of moral relativism. Furthermore, this justification is compatible with the universal nature of liberal rights. I will argue that the argument this justification rests on fails at three important levels, and therefore should be rejected.

6.1 Freemans Defence of Rawls's List of Human Rights

Tan (2005, 696-7) observes that a quite common cosmopolitan critique of LP is that even following the logic of Rawls's account, using an original position of peoples instead of individuals, liberal peoples would select a more inclusive list of human rights. However, what principles are selected and how they are interpreted depends on how the representatives of liberal peoples are modelled. Part of the purpose of the use of an original position with a veil of ignorance is that the principles arrived at only reflect the self-interest of the representatives, as it is manifested and constrained by the use of a veil of ignorance.

The second-level original position is designed to decide the principles that should guide the foreign policy of liberal peoples and the rules that should govern the Society of Peoples. Rawls starts by populating this original position with liberal peoples. These representatives know that the internal justice of their own societies is at a standard that satisfies their own conception of justice, because they are aware of their representation of

liberal peoples. Freeman (2006b, 47) bases a defence of Rawls's list of human rights on this observation by writing:

Importantly, (...) the representatives of liberal peoples are concerned *solely* with promoting the "fundamental interests" of the individual society that each one represents. (...) their main aim is to obtain terms of cooperation among peoples that best guarantee liberal justice within their *own* society and among their *own* people. (...) they are not moved by benevolence toward other peoples or even by a concern that liberal justice be done for its own sake. They are mutually indifferent in this regard.

The modelling of the representatives in this way reflects the way the original position is used in Rawls's domestic theories. One of the obvious strengths of this modelling is that by letting the representatives only care about their own interests, the normative force of the subsequently chosen principles of justice will potentially be strong. Rawls can say that they are chosen purely on the self-interest of the actors involved, as this self-interest manifests itself when choices are made under a veil of ignorance that hides information that is arbitrary from a moral perspective. As long as one agrees with Rawls that certain information is arbitrary from a moral perspective, it is easy to be persuaded by his argument for the selected principles.

To transfer this logic to the second-level original position of liberal peoples seems to answer the liberal criticism of LP I presented at the beginning of this section. This is the argument that representatives for liberal peoples would select a list of rights that included rights that liberal peoples believe all individuals should enjoy (Freeman 2006b, 48).³¹ If we assume, as Freeman does, that the representatives only care about the interests of their own society, and are not moved by benevolence or that liberal justice be done for its own sake, then it is true that they have no reason select a list of human rights that include liberal rights. Before one gets too carried away with this defence of Rawls however, it should be noted that it seems to come at a great cost. If the representatives of liberal peoples are modelled as exclusively self-interested, then why do they choose any human rights at all? It seems more natural for the representatives to dismiss both the human rights principle and the duty of assistance, and let the remaining principle guide their foreign policies.

³¹ Freeman presents his understanding of Rawls as part of an exchange of arguments with Tan. Tan (2005, 698) responds to Freeman by arguing that "(...) [I]t is representatives of *individuals* who ought to be present at a global original position. A liberal construction of justice could not proceed in any other way given liberalism's fundamental commitment to individual well-being." My thesis however, assumes that a cosmopolitan original position is not an option. For my purposes then, Tan's argument for a global original position is blocked.

Freeman (2006b, 49) answers this objection by noting that concerns for their own security can form the rationale for choosing Rawls's list of human rights. According to Freeman (2006b, 49), liberal peoples have much reason to fear states that do not honour Rawlsian human rights. Especially if one assumes that they have such a society as a neighbouring country. Behind the veil of ignorance, the representatives presumably have no information about the level of internal justice in neighbouring states, or the relative strength of such societies. The people they represent might be situated besides a state much stronger than their own that readily violates the human rights of their own members. Therefore they would endorse a constrained list of human rights in order to guard their own security and the rights of their own citizens. Freeman's argument is contingent on an understanding that states that do not honour Rawlsian human rights always, or nearly always, constitute security risks for liberal peoples or risks to the rights of their citizens, at least if these liberal peoples are the neighbouring countries of such outlaw states.

It is important to note that Freeman does not deny that liberal peoples are concerned or even fundamentally invested in their liberal aspirations for the rest of the world. His argument is only that such concerns are not supposed to be present in the original position, where self-interested representatives select the principles of justice.

6.2 The problems of the security argument

One important aspect of this defence of Rawls is that it wields a very internally consistent conclusion. Freeman's defence seems to explain why the list of human rights is constrained to the basic. Moreover, since purely self-interested representatives of liberal peoples select the human rights principle, the argument seemingly adds normative force to the idea of universal human rights. Finally it contributes to align Rawls's domestic and international theories, as the first-level and second-level original position are used in the same way. The problems, in my opinion, are correspondingly threefold: First, it is questionable that the honouring of Rawlsian human rights is a necessary condition for non-aggression against liberal peoples, and the preserving of the liberal and urgent human rights of their citizens. Second, such a rationale for a list of human rights is, despite the claims of Freeman, instrumental and rhymes very badly with the ideas human rights are founded on. Third, Freeman's view of the proper representative of a liberal people defies plausible intuitions of what the interests of such an actor should be. Correspondingly, Freeman relies on an interpretation of Rawls that, at

important conjunctions, seems to contradict what Rawls is actually saying. In the following subsections, I will discuss these problems more extensively and draw upon the conclusion that Freeman's arguments are seriously flawed.

6.2.1 Security Risks

While Freeman's argument that security concerns would drive representatives of decent peoples to endorse Rawls's list of human rights is somewhat intuitively plausible, it could be criticized as being both too optimistic and too pessimistic on behalf of the virtues of individual rights.

It might seem plausible that there would generally be a significant gap in the security risks between states that honour Rawlsian human rights and those that do not. Therefore liberal peoples would want to insure that no states violated Rawlsian human rights. However, this gap of insecurity might be significantly bigger, and reflect more accurately a stable solution, if it is set between states that do not honour Rawlsian human rights and states that are democratic. Rawls himself writes quite extensively on the idea of a "democratic peace".

Though liberal democratic societies have often engaged in war against nondemocratic states, since 1800 firmly established liberal societies have not fought one another.
(Rawls 1999b, 51)

If Rawls is right here then the security of liberal might be more stable if all societies were required to be liberal democracies. Therefore one could argue that the representatives would not choose Rawls's list of human rights, but a list that included liberal rights as well.

However, not only the possibility of the aggressive foreign policies of certain states that regularly violate human rights is a concern here. The populations of outlaw states might be driven to inflict violence, aggression or other criminal activities such as terrorism on foreign soil or piracy in surrounding or international waters. Freeman might argue that states that violate Rawlsian human rights are always dangerous at least to their neighbouring states either through their deprived populations or through their foreign policy (Freeman 2006b, 49). Nondemocratic states on the other hand are only dangerous under certain conditions. However, is it true that states that violate Rawls's list of human rights are always dangerous to their surroundings? According to Charles Beitz (2000, 685) "(...) it is not hard to think of regimes which are oppressive domestically but whose international conduct is not "aggressive

and dangerous””. Freeman (2006b, 49) fends off this objection by arguing that the foreign policy of a state that does not honour human rights is not the only issue:

One only has to look at the dislocation of individuals and the disruption and war among neighboring nations that is caused by violations of human rights in Africa today.

I do not believe that this is a satisfactory reply because it is possible to imagine societies where the violation of the basic human rights of the members has no consequence for their neighboring countries. The violating might for instance be geared towards a small minority. Or it could be perpetrated by a state with a strong and absolutistic institutional foothold on society. This is often not the case in the African example Freeman is referring to. One might, like Rawls does with decent hierarchical peoples, argue that it is possible for such societies to exist. However, more concrete examples could possibly be made. For example, it is likely that South Africa under Apartheid did not honour Rawlsian human rights. Moreover, it is not clear that any representative of liberal peoples, out of pure self-interests generally and security concerns specifically, would object to the lack of honouring of such rights in a state like Apartheid South Africa. Whether or not this is a valid example however, is not that important. The important thing is that it is far from impossible for a society that Freeman’s representatives would accept and which violates Rawls list of human rights to exist.

Concluding on this discussion, it is difficult to be convinced by the argument that security concerns would lead liberal representatives to endorse Rawls’s specific list of human rights. They could possibly choose a higher level of human rights, but they could also disregard the human rights principle altogether and let the other principles guide non-ideal theory on a case-by-case basis. Societies that are security concerns for whatever reason would then be dealt with in whichever way best suited to accomplish compliance with the abridged version of the Law of peoples. Sometimes improvements on internal justice (for instance the urgent human rights situation) might be warranted, whilst not being the case in others. Under such a framework, a society mirroring that of South Africa under apartheid would presumably remain untouched by sanctions. The same would be the case for a variety of strongly organized states that subject its members to the cruellest forms of oppression.

Obviously, if Freeman is correct in suggesting that the representatives of peoples in the original position should be modelled in the way he argues, and at the same time he is wrong to assume that this would lead to a human rights principle in the Law of Peoples, then

Rawls's position is seriously compromised. A Law of Peoples without a human rights principle and a duty of assistance seems a grim representation of international justice.

6.2.2 Instrumental Human Rights

Assume that we accept the logic in Freeman's argument that self-interested representatives for liberal peoples, under a veil of ignorance, would choose the same list of human rights as that presented by Rawls due to security concerns. However, is such an instrumental defense of human rights desirable? One could perhaps argue that if a list of universal *human* rights is chosen by representatives of liberal peoples because of their own security concerns, and not at all because of an understanding of the importance of the moral value of all individuals, then the justification is not viable because it is not arrived at for the right reasons. It seems unappealing that such an important idea as human rights should be bundled into a theory of justice because of concerns that have nothing to do with the concepts and ideas attached to human rights.

Freeman's justification for the choice of the human rights principles seems to seriously contradict any intuition one could have about the nature and role of human rights. Freeman (2006b, 50) deals with this challenge specifically and argues that to see Rawls's justification for human rights as purely instrumental, fails to acknowledge that "(...) the parties in the original position are only part of a larger argument." By this he means the following:

Just because, from the point of view of the parties to the original position, respect for human rights by other peoples is important for instrumental reasons, does not mean that the Law of Peoples regards human rights purely instrumentally or from a self-interested perspective (Freeman 2006b, 50).

Although Freeman does not address Beitz or other liberal critics specifically here, it is natural to see the above citation in relation to comments Beitz (2000, 685) makes:

(...) [T]he reason why people have human rights not to be tortured does not seem to be that regimes that torture are dangerous to other regimes: although the latter fact (if it is a fact) might justify intervention, it does not say anything about the moral situation of the tortured.

Freeman's point seems to be restricted to saying that the human rights principle in itself, and the rights it entails, are not seen by liberal (and decent) peoples, or the Law of

Peoples itself as instrumental. The justification for its *inclusion* among the principles of the Law of Peoples however, remains purely instrumental. Therefore his response against those that might criticize him for providing an unappealing justification for human rights seems to only address half of the issue (at least if one holds that it is relevant why a principle is selected). A human rights principle whose selection is justified without the slightest reference or acknowledgement of the well being of the persons involved is unappealing. How much of a problem this would be for Freeman's argument is perhaps a point of contention. However, there is at least one further problem.

Freeman seems to want to have it both ways. He does not deny that liberal peoples are fundamentally concerned with a broad understanding of human rights, and that they likely regard liberal rights as universally applicable. In fact part of his argument seemingly depend on it because he wants to argue that liberal peoples do not see the human rights principle as instrumental even though it is selected for instrumental reasons. However when liberal peoples deliberate on the human rights principle outside of the original position and endorse it for reasons that are not instrumental, they will also discover that they endorse a much more extensive list of human rights for the same non-instrumental reasons. There is an unsettling dissonance then, between the views of liberal peoples and their representatives in the original position.

Some of the point of modelling individuals as only self-interested in domestic theory, on my interpretation, is to show that personal beliefs or preconceived notions about justice are not necessary for the representatives of individuals to unanimously agree to the principles of justice Rawls is proposing. This gives Rawls's vision great normative force. However, if one assumes that the fundamental interests of liberal peoples are not a matter of great contention, then there is a reduced need to model representatives for peoples the same way as individuals are modelled in domestic theory. It is self-evident that liberal peoples believe that all individuals should have rights like democratic participation and freedom of speech honoured by the state they live in. To not let their representatives in the original position take this into consideration when selecting principles of international justice seems strange. It might be argued that Freeman becomes so concerned with what he perceives to be the technical rules of an original position argument, that he fails to acknowledge the obvious and commonsensical solution of just modelling representatives of liberal peoples on some basic, uncontroversial assumptions of the interests of liberal peoples. After all, the representatives *know* that they represent liberal peoples.

It seems damaging to the appeal of the argument that the human rights principle would be selected among the principles of the Law of Peoples, that the only justification representatives for liberal peoples can find for endorsing such a principle, is that societies that do not respect such rights are threats to the security self-interests of liberal peoples. This justification is instrumental. Furthermore, the justification to not include liberal rights is also instrumental. This remains true whether or not liberal peoples themselves endorse human rights for more proper reasons. Furthermore, the assumptions about liberal peoples that Freeman uses to show that the Law of Peoples does not regard its human rights principle as an instrumental principle, reveals a dissonance between the Law of Peoples and liberal peoples. Freeman draws upon the moral nature of liberal peoples to argue that the human rights principle does not have an instrumental function in the Law of Peoples. However, this moral nature leads to a more inclusive list of human rights.

6.2.3 Plausibility and Interpretation

If the representatives know they represent liberal peoples, they should also know that liberal peoples are invested in the idea of human rights. Consequently this knowledge should influence the agreement reached by these representatives. If all liberal peoples agree that human rights, including liberal rights, are important in themselves, it seems likely that they would object to their representatives in the original position being modelled the way Freeman argues. Presumably a similar justification can be given for the modelling of individuals as self-interested in domestic theory. Many individuals care more or less exclusively about their own good. Because of this, it would be unfair of Rawls to model their representatives as being benevolent (however, it is not unfair to apply the veil of ignorance as it only hides information that is arbitrary from a moral point of view). This suggests that representatives of liberal peoples *should* be modelled to reflect some of the basic views of liberal peoples, including a strong concern for human rights broadly conceived because they would unanimously hold these interests. If they are not modelled this way, as Freeman suggests, they could (or one could claim that they would) reasonably dismiss the Law of Peoples as failing to reflect their interests by modelling their representatives unfairly. Importantly, this holds true whether or not Freeman's interpretation of Rawls is plausible. I will now argue that his interpretation of Rawls seemingly contradicts Rawls's own view.

Rawls's arguments in LP are sometimes difficult to coherently reconstruct, which leaves the door open to many different interpretations on the justification of his statements.

The arguments Freeman assigns to him concerning the modelling of representatives of liberal peoples however, seems more or less straightforwardly to contradict what he is saying. The somewhat limited cause there is for Freeman's interpretation is overshadowed by the fact that Rawls never explicitly states what Freeman suggests. Being an assumption of such fundamental importance, this is surprising if Freeman's interpretation is correct. However, the main point is that unless Rawls deliberately clouds the issue here, then what he writes contradicts Freeman's interpretation.

In order to refute Freeman's interpretation of Rawls, one needs to look closer at his justification:

Earlier in section 2.3 of *The Law of Peoples*, Rawls sets forth four fundamental interests of liberal peoples: "They seek [1] to protect their territory, [2] to ensure the security and safety of their citizens, and [3] to preserve their free political institutions and the liberties and free culture of their civil society. Beyond those interests, a liberal people [4] tries to assure reasonable justice for all its citizens and for all people" (*LP*, 29). In section 3.3 Rawls adds a further interest, [5] "a people's proper self-respect of themselves as a people" (*LP*, 34). It is important to my argument above and, I believe, to Rawls's argument as well) that a distinction be drawn between the fundamental interests of liberal peoples, and the motivations of their representatives in the original position. It is a fundamental interest of liberal peoples "to assure reasonable justice . . . for all people"; this is what it means for a people to "have a moral nature." But as for the representatives of peoples in the original position, they are not moved by this moral motive. Like the parties to the domestic original position, they are "modeled as rational" in Rawls's sense (*LP*, 32, 33), which means they are not morally motivated and are indifferent toward the interests of other parties and peoples they do not represent (except insofar as it promotes the fundamental interests of their own people). This motivational assumption of mutual indifference of the parties is necessary for the structure of the original position, in order for it to do the work Rawls assigns to it: namely, to regulate rational judgements (regarding the interests of those one represents) by reasonable constraints (the veil of ignorance and other constraints of right). Nevertheless, the fact that the parties' representatives are modeled as purely rational and indifferent to one another and other peoples does not by any means imply that liberal peoples themselves are purely rational and indifferent. (Freeman 2006b, 47n).

The distinction Freeman wants to draw between the fundamental interests of liberal peoples and the motivations of their representatives in the original position is unaccounted for by Rawls himself. Furthermore, what Rawls (1999b, 33) writes seemingly contradicts it:

(...) [T]he use of the original position at the second level [is] a model of representation in exactly the same way it is at the first. Any differences are not in how the model of

representation is used but in how it needs to be tailored given the agents modeled and the subject at hand. (...)

This suggests that Rawls thinks the representatives can be modeled differently in international theory than domestic theory, because there are fundamental differences between the two sets of agents. Rawls (1999b, 33) then goes on to list the features of the international original position. For my purposes, the last and fifth stands out:

[T]he selection of principles for the Law of Peoples is based (5) on a people's fundamental interests, given in this case by a liberal conception of justice (already selected in the first original position).

It should be apparent then, that Rawls is quite explicit that it is in fact the fundamental interests of a people, given by their conception of justice, that is the basis for the selection of principles for The Law of Peoples. If Rawls nevertheless intends what Freeman suggests however, then what he actually writes is not simply ambiguous. It is downright misleading.

It seems reasonably clear that Freeman's interpretation conflicts with Rawls's account. Some confusion might nevertheless arise because, seemingly oblivious to Freeman, the interests liberal peoples have to try to "(...) assure reasonable justice for all its citizens and for all peoples (...)" (1999b, 29), is not clearly held by Rawls to be a fundamental interest. However, it seems implausible that the conception of justice of liberal peoples, which makes up their fundamental interests, would not include the idea that all individuals have rights to democracy, freedom of speech and non-discrimination.

Freeman could perhaps argue that his defense of Rawls is not as much a plausible interpretation of LP as it is a necessary adjustment. Indeed he could be understood to imply as much (Freeman 2006b, 47n). My main point however, is not primarily that his interpretation differs too much from what Rawls actually writes (although this is significant). My argument has been, on the one hand, that it is implausible to model representatives of liberal peoples to be unconcerned about human rights (including liberal rights) violations in other societies. On the other, assuming that we nevertheless do model their representatives in the original position as exclusively self-interested, it is unclear that such representatives would in fact endorse the human rights principle in the way that Freeman suggests. Furthermore, even if we assume that they would, we are left with an unappealingly instrumental justification for Rawls's doctrine of human rights. The fact that Rawls contradicts Freeman's interpretation, simply adds to these more pressing concerns. On the back of all of these concerns I conclude

this discussion by noting that Freeman's proposed justification for Rawls's narrow conception of human rights is based on seriously flawed arguments and assumptions and should therefore be rejected.

Thus far I have rejected the argument that a list of human rights must be acceptable to the non-liberal moral beliefs of decent peoples, even on the understanding that the question at hand is not directly the justice of a polity but whether it can be shown as legitimate. I have argued that the supposed fact that persons with decent beliefs dominate decent societies does not make the enforcement of fundamentally unjust laws morally justified. In the present chapter I have rejected Freeman's defence of Rawls's list of human rights, even though it did not depend on a morally relativistic justification. At this point it might seem as if the answer to the first question this thesis presents is that Rawls's narrow doctrine of human rights cannot be plausibly defended. However, I will go on to argue that it can be. In the next chapter I return to the issue of concessions to the moral beliefs of decent peoples. However, the purpose of this chapter is to trace Rawls's arguments and show that, although a common interpretation of Rawls is that his list of human rights is constrained out of tolerance for the moral beliefs of decent peoples, it is uncertain whether this is Rawls's actual position. At best it leaves out one important aspect of his argument from the equation. This aspect, namely the value of self-determination for a people, opens up for to a more plausible understanding of Rawlsian human rights.

7 The Ambiguous Nature of Rawls's Toleration Argument

Does Rawls opt for a narrow doctrine of human rights because he believes a more extensive list of rights to be intolerant of what most liberals would argue to be unacceptable beliefs about morality? In my opinion, the arguments in LP remain ambiguous enough to coherently argue that he does not. In this chapter I elaborate on this opinion and address three aspects of Rawls's text to support this view. First, Rawls avoids making the point at junctures where it seems natural to do so. In fact he seemingly avoids making any explicit commitment to an argument that explains why human rights do not include liberal rights. Second, the times he seemingly addresses the argument of tolerance for the moral point of view of decent peoples as constitutive to the list of human rights, the argument can only be identified by implication. Third, when writing about toleration for decent peoples, Rawls implies a different argument for the narrow nature of his list of human rights than concessions to the moral beliefs of decent peoples, namely the value of self-determination for a people.

7.1 The Difficulties in Identifying Rawls's Argument

The first problem with identifying Rawls's view on human rights is that he seems to avoid making his point. Consider the following set of passages taken from pages 78-79 in LP. Rawls (1999b, 79) starts by stating: "It may be objected that the Law of Peoples is not sufficiently liberal". At this point the reader is offered some hope of clarification. It would seem natural for Rawls to follow this statement with arguments explaining why the human rights doctrine should not be liberal, or conversely, why it indeed is sufficiently liberal. Instead, there are no arguments following the statement, only new statements that could only be generously described as hinting at an argument:

[S]ome think of human rights as roughly the same rights that citizens have in a reasonable constitutional democratic regime; this view simply expands the class of human rights to include all the rights that liberal governments guarantee (Rawls 1999b, 78).

Rawls does not explain here why it would be wrong to hold the view he describes. Perhaps he feels that his response shows why it is absurd. However, to argue that it does would be to give

his response too much credit. A conception of human rights that include important liberal rights seems sensible. That liberal governments guarantee these same rights does not show why they should not be considered human rights.

Be that as it may, the type of argument that Rawls seems to allude to in this passage, is one that explains why liberal peoples would not choose roughly liberal human rights in the first second-level original position. It is perhaps not obvious that the knowledge, on the part of the representatives, that they are representing liberal peoples, would lead them to select a list of human rights that include the liberal rights they know all varieties of liberal peoples would honour and protect internally. However, when reflecting on the kind of human rights endorsed in the UDHR and the moral convictions of liberal peoples, it does seem likely that they would do so. Unfortunately Rawls provides no real and unambiguous explanation for why liberal peoples would not choose roughly liberal rights as human rights. The next passage offers little help, but could be said to hint at an explanation that should be familiar by now:

Human rights in the Law of Peoples, by contrast, express a special class of urgent rights (...). The violation of this class of rights is equally condemned by both reasonable liberal peoples and decent hierarchical peoples (Rawls 1999b, 78-79)

The last sentence here could be said to suggest that rights whose violation could not be condemned by both liberal peoples and decent hierarchical peoples alike, should not be seen as human rights. However, this is not what the sentence actually conveys. It simply makes the observation of the dual condemnation. It is a matter of interpretation to assume that singular condemnation would be the result of an unacceptable list of human rights. The elusive character of Rawls's arguments is striking.

The set of passages observed at here commenced by seemingly promising answers, yet no argument could be distinguished. Furthermore, a justification was only hinted at in a vague, inadequate manner. This non-committal treatment of the discussion on human rights seems to be a common theme throughout Rawls's text. When Rawls (1999b, 80n) writes about the difference between proper human rights and liberal aspirations for instance, he provides no real justification for why liberal rights are seen as aspirations instead of as proper human rights. Rather, he seems to assume that this is common knowledge.

7.2 Implications over Explications

Let's return to the passage that leads Buchanan, among others, to interpret Rawls as suggesting that it would be wrong for liberal peoples to endorse a human rights doctrine that could not be accepted by an associationist view of the good, because this view is "not fully unreasonable". The passage reads the following:

These rights do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or in some way distinctive of Western political tradition and prejudicial to other cultures. Still, the Law of Peoples does not deny these doctrines (Rawls 1999b, 68).

Whatever Rawls might be implying, nowhere in this passage does he deviate from the ambiguous reasoning found in the passages discussed above. He does not explicitly state that a rejection from decent peoples is the reason why certain rights are not chosen by liberal peoples in the first original position. The only thing he explicitly states is that the rights chosen are compatible with the views of decent peoples. If he is not stating it explicitly however, we could argue, as Buchanan does, that he is strongly implying it and that it therefore is what he really means. The best we seem to get from Rawls is suggestive justifications. On this background, the idea of concessions to the beliefs of decent peoples is a plausible interpretation, even if Rawls fails to explicitly state that this is the reasoning behind the short list of human rights. This interpretation seems to be backed up by the fact that Rawls argues quite extensively that liberal peoples should tolerate decent peoples by both accepting them as equal participating members of the Society of Peoples and by not applying coercive sanctions on them. However, when Rawls writes about toleration for decent peoples he suggests a qualitatively different justification.

7.3 Rawlsian Tolerance and the Value of Self-Determination

Toleration of decent peoples entails more than just exempting it from sanctions, which is the result of honouring human rights. To the extent that toleration means that a regime is exempt

from sanction, then also benevolent absolutisms are also tolerated. “To tolerate also means to recognize these non-liberal societies as equal participating members in good standing of the Society of Peoples (...)” (Rawls 1999b, 59). Furthermore, Rawls (1999b, 63) writes:

The second step of ideal theory (...) challenges us to specify a second kind of society – a decent, though not a liberal society – to be recognized as a *bona fide* member of a politically reasonable Society of Peoples and in this sense “tolerated.”

Thus it is important to note that Rawls’s arguments for “toleration” of decent peoples are not the same as his arguments for (or assumption of) his narrow doctrine of human rights.

Rawlsian toleration then, seems to relate to the question of equal treatment and acceptance, as well as the selection of human rights.

Even if toleration in some respects is a different issue from human rights, Rawls focuses his arguments in favour of toleration of decent peoples on the contention that decent peoples should not be coercively liberalized.

(...) [I]f liberal peoples require that all societies be liberal and subject those that are not to politically enforced sanctions, then decent nonliberal peoples – if there are such – will be denied a due measure of respect by liberal peoples. (...) Denying respect to other peoples and their members requires strong reasons to be justified. Liberal peoples cannot say that decent peoples deny human rights, since (...) such peoples recognize and protect these rights (...) (Rawls 1999b, 61).

It should be noted that Rawls seems to suggest here that the list of human right precedes the notion of toleration of decent peoples, and not the other way around. This is evident by the use of the fact that decent peoples respect human rights as an argument for why they should be tolerated. However, as is apparent from the wording, at this point Rawls is in fact tackling the question of whether decent peoples should be proper subjects of sanction. Since the list of human rights defines when sanctions in principle are justified, then presumably his arguments should be seen as part of a defence for his list of human rights. If this is the case, then Rawls must do better than to argue that decent peoples should not be sanctioned because they honour human rights. To say that toleration of decent peoples means that the human rights list must not include liberal rights, and at the same time say that we tolerate decent peoples because they respect the list of human rights is to make a circular argument. If Rawls did not say anything more than this, he would have provided no argument for why the list of human rights should not include liberal rights. However, he further addresses this issue by stating:

Leaving aside the deep question of whether some forms of culture and ways of life are good in themselves (as I believe they are), it is surely, *ceteris paribus*, a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life. In this way political society is expressed and fulfilled. This is no small thing. It argues for preserving significant room for the idea of a people's self-determination (...) (Rawls 1999b, 61).

A people's self-determination then, is an important good according to Rawls. Since Rawls refers to this good when arguing that decent peoples should not be the subjects of coercive sanctions, it seems that the value Rawls puts on self-determination, is at least part of his argument for a short list of human rights.

Some might think that narrowing a list of human rights because of the value of self-determination is the same thing as narrowing it in deference to certain intolerant moral beliefs. However, the two arguments are clearly distinct and rest on quite different normative judgements. We might for instance say that it is irrelevant that someone who denies that human beings should be treated as free and equal rejects our conception of justice. At the same time we might accept that the value of self-determination can override some of our concerns for justice in other societies.

At the start of this chapter I asked whether it is clear that Rawls chooses a narrow doctrine of human rights because he believes a more extensive list of rights to be intolerant of what most liberals would argue to be unacceptable beliefs about morality. I have shown that Rawls's arguments that support this justification are ambiguous. Furthermore, I have shown that Rawls at least implies a different justification, namely the value of self-determination³². Furthermore, while the value of self-determination for a people does not have strong implications for internal legitimacy, it seems relevant for questions of recognitional legitimacy³³. Liberals might for instance say the wielders of power in decent regimes are not morally justified in enforcing their laws because of the lack of liberal justice in such societies. At the same time they might argue that the level of internal justice in decent societies is at a sufficiently high level where further reform should not be applied in a way that violate self-determination. Therefore they might extend such societies recognitional legitimacy.

³² Note that for the value of self-determination to be a relevant justification for narrowing the list of human rights, Rawls must argue that his human rights list should only include those rights that, at least in principle, justify coercive sanctions. This, of course, is what Rawls argues. However, many will question whether this is a plausible way to conceive of human rights. The close connection between coercive sanctions and Rawls's list of human rights is the subject of chapter 9.

³³ See chapter 5 where I discuss the role of legitimacy and argue that the Law of Peoples is exclusively concerned with the issue of recognitional legitimacy.

In the next chapter I discuss David Reidy's defence of Rawls's list of human rights. Reidy (2006) elaborates on what Rawls writes about the value of self-determination and develops a plausible defence for Rawls's short list of human rights.

8 Intervention, Reciprocity and Self-Determination

Freeman (2006b, 47n) argues that his interpretation of LP³⁴ is important to Rawls's own argument for toleration because if the parties in the original position were assumed to be concerned that all individuals should enjoy liberal rights, then they would be concerned about the lack of liberal justice in all non-liberal decent peoples. Consequently they would select a more inclusive list of human rights, and subsequently not tolerate decent peoples. However, there is no question that liberal peoples believe that all individuals should enjoy liberal rights. If the reason why liberal peoples tolerate decent peoples is that their representatives failed to take this into account then Freeman's interpretation explains how Rawlsian tolerance can result from an original position of liberal peoples and at the same time seemingly contradict liberal ideas. However, it is a very unappealing explanation because it relies on tricking liberal peoples to endorse a conclusion they seemingly otherwise would not make by modelling their representatives unfairly. Any conclusions derived from such an approach seem of little relevance. The discussions in this chapter will show that Freeman's interpretation might not be important to Rawls's own argument.

Thus far I have argued that it seems both unacceptable and unlikely that liberal peoples would choose to constrain their list of human rights because some peoples or persons would reject core liberal assumptions. I have also rejected the view that the representatives for liberal peoples in the original position should be modeled without reference to their belief that liberal rights are universal in their normative force. In this chapter I discuss Reidy's (2006) proposed justification for Rawls's list of human rights, which does not rely on any of these interpretations of LP.

8.1 The Relationship Between Reciprocity and Self-Determination

Building on the criterion of reciprocity as well as the value Rawls puts on a people's self-determination, Reidy (2006, 177) develops what he calls a "Rawlsian justification" of Rawls's narrow conception of human rights. The criterion of reciprocity requires those proposing a

³⁴ Stating that the representatives in the second-level original position(s) should be modelled as exclusively self-interested.

particular set of rules to think it at least reasonable for others to accept them (Rawls 1999b, 136-137). Decent peoples might reject liberal human rights because of their non-liberal beliefs, but since decent peoples deny that persons should be treated as free and equal, then their reasons for this rejection would not really be reasonable. As shown earlier, the idea of making concessions to the conceptions of morality in non-liberal societies is not a compelling argument for narrowing a doctrine of human rights, and certainly not one liberal peoples would make. The criterion of reciprocity does not change this.

Reidy's interpretation of Rawls supports the idea that Rawls does not let liberal peoples make concessions to the moral point of view of decent non-liberal peoples in order to come up with merely a basic list of human rights. Furthermore, Reidy's defense of Rawls suggests that such concessions are not necessary to justify the choice of basic human rights in the Law of Peoples. Reidy's argument is that given the basis of liberal people's proper patriotism³⁵, and given the fact that violations of human rights in Rawls's framework allows for coercive sanctioning to rectify such violation, it would be unreasonable of liberal peoples to list liberal rights as human rights (Reidy 2006, 177-185). Reidy (2006, 179) notes that given the role of Rawsian human rights, the consequences of applying a list of human rights that requires basic liberal rights such as democracy, freedom of speech and non-discrimination is that polities that violate such rights would be denied self-determination. One might argue that although this is true, the question of why this should be seen as a problem remains. Two main points could be made in relation to this response.

Firstly, just because coercive sanctioning is justified in principle, its implementation would depend on other variables. The most pressing variable is whether the implementation is likely to cause human suffering, or lead to actual and stable reform. For instance, one might plausibly argue that the aspects of contemporary American foreign policy that involve the use of war to forcibly influence non-democratic states towards democracy fail in both these respects. Thus, it is important to note that even if we endorse the most inclusive list of human rights, foreign policy initiatives even remotely resembling for instance the Iraqi war are not necessarily warranted just because we work under the assumption that human rights violations, in principle, justify the use of coercive sanctions.

Secondly, based on the lack of internal justice and political legitimacy in societies that violate important liberal rights, there seems to be good reason to allow for the usage of

³⁵ "This interest is a people's proper self-respect of themselves as a people, resting on their common awareness of their trials during their history and of their culture with its accomplishments" (Rawls 1999b, 34). Rawls sees this as one of the fundamental interests of peoples.

coercive sanctions, when such sanctions would not defeat its own purpose, not involve violation of other, more urgent human rights, and have positive effects in the form of achieving steps towards liberal reform.

Reidy's (2006, 180) argument however, is that some introspection by liberal peoples would lead to the realization that they themselves (or liberal peoples in general) at one point in development did not either respect the rights to equal participation, freedom of speech and non-discrimination. Furthermore, they regard their own domestic orders as their own achievement and as a great source of pride. Reidy argues that they feel this way at least partly because they were free to liberalize in their own way and on their own time. Therefore when developing the principles of international justice, liberal peoples are compelled to take into account their own self-understanding and the historical basis of their proper self-respect. When deciding what set of human rights defines the cut that justifies a denial of self-determination, they would not only be interested in whether the internal justice of other societies matches their own convictions. They would question at what (perhaps hypothetical) point in their own historical development would their own level of internal justice justify forceful intervention and denial of self-determination. Since their own sense of achievement and proper self-respect comes from their own achievements of liberalization and democratization, and they recognize this self-respect as fundamental to their interests, it would be unreasonable to deny all other, presently non-liberal peoples, the ability to go through the same developments on their own terms.

Reidy (2006, 177) accepts that Rawls does not provide a thorough justification for his list of human rights. However he argues that Rawls does much to suggest the justification Reidy develops. There is little doubt that reciprocity is a central idea for Rawls. Furthermore, at several points Rawls emphasizes the importance of self-determination:

(...) [S]elf-determination, duly constrained by appropriate conditions, is an important good for a people (...) the foreign policy of liberal peoples should recognize that good and not take on the appearance of being coercive. Decent societies should have the opportunity to decide their future for themselves (Rawls 1999b, 85).

According to Reidy (2006, 180), the question we should ask ourselves is the following: "What could all liberal democratic peoples agree to as minimally sufficient to justify their own claimed right to self-determination and non-intervention?" Reidy (2006, 183) concludes that a polity organized as a viable constitutional republic would satisfy this requirement from the point of view of liberal peoples. Human rights, on this reading would be

only those that are “(...) essential to a well-ordered constitutional republican form of government” (Reidy 2006, 183). As such, they will not include “(...) general rights to democratic political processes or nondiscrimination” (Reidy 2006, 183). Therefore the justification for the narrow conception of human rights is that it is consistent with a liberal people’s own sense of self-respect and their own claim to self-determination. Reidy argues that the past processes of democratization and liberalization form an important part of this proper patriotism. Liberal peoples would not accept that they, if possible, could have been denied self-determination when they were at a point in their development where they respected Rawls’s list of human rights, but not a list including basic liberal rights. Consequently, they would regard it as unreasonable to deny similar terms to societies that have not yet reached the level of development of liberal peoples. Reidy (2006, 180-181) argues that in decent societies the members are bound to one another and to their body politic in a morally significant way. I have argued that several aspects of a decent society mean that the wielders of power are not morally justified in enforcing their laws. However, this does not mean that their authority is without moral significance.

Reidy offers, in my opinion, a plausible justification for why the list of international enforceable human rights is constrained to the basic. While the argument that a list of human rights must make concessions to the moral points of views of decent peoples involves an unappealing moral relativism, the argument from self-determination is not in conflict with the idea of the moral universality of political liberalism. Liberal peoples might still argue and believe that while they extend to some non-liberal peoples the privilege of self-determination, the members of such societies still have a right to live in a liberal democracy. Liberal peoples are in their rights to voice critical objections to non-liberal peoples based on for instance political liberalism (Rawls 1999b, 84; Reidy 2006, 184). So even though liberal peoples recognize that some decent, non-liberal peoples deserve self-determination and should be given the status of equal participating members of the Society of Peoples, they can rightly criticize such peoples for failing to provide their members with the rights that justice that liberal peoples believe internal legitimacy demands.

Nevertheless, some challenges might be made against Reidy’s defense of Rawlsian human rights. In the next sections I discuss some of these. Furthermore, the next chapter challenges one of its fundamental assumptions.

8.2 An Overvaluing of Self-Determination?

One might object to Reidy's defence of Rawls by arguing that it puts too great a value on self-determination. For instance, assume that a well-ordered decent society would democratize and liberalize fully in the space of 20 years via the use of coercive sanctioning (diplomatic, economic or military). Additionally, further assume that without intervention and with recognition, the same process would take 200 years. Such scenarios are possible within the scope of Reidy's argument, thus seemingly overvaluing the virtues of self-determination.

The strength of a cosmopolitan alternative is that it can be sensitive to such scenarios. Cosmopolitans will only use coercive measures if such measures would lead to liberal reform. If self-determination is important to a particular people, then coercive measures are likely to have the opposite effect. Therefore the cosmopolitan foreign policy would refrain from sanctioning that society. Rawls's (1999b, 62) view is that decent peoples are more likely to reform if treated as equals by liberal peoples. He fails to substantiate this claim with empirical evidence yet the idea has a degree of intuitive plausibility. This stems from the idea that states branded as "outlaw" without being granted recognition might then become bitter and resentful (Rawls 1999b, 61). However, since Rawls includes decent societies in ideal theory, then from the point of view of international justice, it does not strictly matter whether decent peoples liberalize in the space of a year or whether they never change. Huseby (2007, 254) notes that according to Rawls, liberal peoples should not apply coercive sanction even if such sanctions would a) lead to liberal reform, and b) not jeopardize world peace, and c) not be the cause of any human suffering. This seems to give a full appreciation of how committed Rawls is to the value of self-determination.

When compared to the cosmopolitan approach, which only would violate the self-determination of a decent people if this violation would lead to liberal reform in a way that does not lead to further violation of urgent human rights, Rawls's valuing of self-determination seems too extensive. Alternatively, one can say that Rawls's theory relies on the empirical premise that decent peoples would evolve in a liberal direction if allowed to do so without coercive interference.³⁶ A more precise formulation of this premise is the following: Decent peoples would not reform significantly more effectively by the use of

³⁶ Alyssa Bernstein (2006, 292) makes this point, and adds that this premise seems defensible.

coercive sanctions than by the use of non-coercive measures in cases where coercive sanctions can be applied without leading to violation of more urgent human rights. If Rawls indeed relies on this premise and it could be shown to be wrong, then Rawls, or his supporters, would have to concede that his theory needed adjustment.

8.3 The Role of Reciprocity

Reidy might argue that the discussion in the section above overlooks the role of reciprocity in Rawls's framework. On this view questions regarding the efficiency that self-determination has on democratization are of little importance. Rather, the important question for Rawls's purposes is at what level of internal justice liberal peoples would argue they themselves would deserve recognition. Furthermore, that Rawls is right that this level corresponds with what Reidy calls a viable constitutional republic.

It might seem reasonable that liberal peoples would argue that they would deserve recognition even in a point of history where they did not truly honour liberal rights. However one of the problems with this argument is that the level of internal justice liberal peoples would select as the basis for their own claims to self-determination could be influenced by a selection bias problem. All liberal peoples did in fact evolve into liberal peoples, and if they were to assess their own claims to self-determination to set terms for other societies' rights to self-determination, they might be influenced by this knowledge. If liberal peoples knew that self-determination for a particular type of decent people is unlikely to lead to democratization, then they might think twice about extending it.

A central argument for Reidy is that one does not have to go far back in the history of contemporary liberal states to find practices that would not be compatible with a list of human rights that included liberal rights.

(...) [S]tates not yet fulfilling the specified basic human rights, those without universal suffrage or with gender or religious restrictions on eligibility for public office, would be denied equal standing within the international order as a moral order. They would not have a right to self-determination and nonintervention (...). At the end of the nineteenth century, then, England and the United States would have had no right against coercive or forceful intervention, diplomatic, economic or perhaps even military, by other states keen to see that women got the right to vote (Reidy 2006, 179).

This compels the representatives of liberal peoples in the second-level original position to specify where they ground their own rights to self-determination. It seems plausible that they would not include many of the rights they otherwise believe are universal. However, my point is that their choice might be influenced by the knowledge that the people they represent in fact have been successful in finding their own paths to become liberal peoples. At least part of the reason why liberal peoples would not see their own claims to self-determination as grounded in their liberal laws could be that they in fact made the transition from a less developed stage into liberal democracies. Therefore, when liberal peoples decide what kinds of societies are worthy of self-determination, it seems that they should consider the possibility that some decent non-liberal peoples that are extended self-determination are organized in a way which means they would severely struggle to find the same path as liberal peoples have done. Some decent peoples might never, or only on a very long time perspective, become liberal democracies. This might not lead to a different list of human rights than Rawls's, but it could lead to slightly different conclusions concerning toleration of certain types of decent well-ordered peoples as equal participating members of the Society of Peoples³⁷.

The objections I have discussed in the latter part of this chapter are less severe than the objections I have raised to the argument that a list of human rights must be acceptable to the moral beliefs of decent peoples and Freeman's argument that Rawls's list of human rights can be justified by modeling representatives of liberal peoples as exclusively self-interested. I think Reidy develops quite a plausible defense of Rawls's short list of human rights - one that is firmly connected to what Rawls himself writes in LP. Nevertheless I have argued that it has some problematic features. Firstly it might depend on the empirical premise that decent peoples would not reform significantly more effectively by the use of coercive sanctions than by the use of non-coercive measures in cases where coercive sanctions can be applied without leading to violation of more urgent human rights. This premise seems defensible. However if it fails, then the use of a fuller list of human rights that in principle allow coercive sanctions might be warranted. Reidy might argue that this premise is not important for Rawls's list of human rights, because liberal peoples are only tasked with specifying at what level of

³⁷ For example it might be argued that the totalitarian features of "Kazanistan" – Rawls's hypothetical example of a decent society – render its institutions static. If the basic political institutions of a society in itself are religious, for instance in a society run by a priesthood (still in the form of Rawls's consultational hierarchy), then the suspicion that the static nature of absolutistic forms of government might endure, and stifle attempts of reform, could lead liberal peoples to think twice about treating them as equal participating members of the Society of Peoples, although they might still withhold forceful sanctions.

development they would endorse their own claims to self-determination. This response could lead to a second problematic feature. This is that Reidy's justification of Rawlsian human rights might be associated with a selection bias.

There is another fundamental and possibly problematic feature with Rawls's list of human rights that Reidy's defence relies on, which has yet to be discussed. This is the assumption that when a theory of international justice is developed, the role of human rights should be to specify when coercive sanctioning can be allowed. This is an important point, which will be discussed in greater depth within the next chapter.

9 Should the Role of the Human Rights Principle be to Specify when Coercive Sanctions are allowed?

Reidy's defence of Rawls rests on one fundamental assumption. Namely that human rights violation should be seen, at least in principle, as grounds for coercive sanctioning. If human rights were not seen this way, they would not directly conflict with the value of self-determination. But is this direct link between human rights and coercive sanctions, which Rawls relies on, plausible? Without this link there is no reason for the representatives of liberal peoples in the original position to tailor human rights around set requirements for self-determination. The role of human rights Rawls seems to endorse exerts, according to John Tasioulas (2000, 384) "(...) additional, largely unacknowledged pressure to keep the list of human rights minimal". I think it is true that the role of human rights in LP constrains the selection of said rights (at least if we favour Reidy's proposed justification over for instance Freeman's). However the question of whether this is problematic or not arises.

I think there are two ways to go about arguing that the relationship between intervention and human rights in LP is implausible. The first criticizes Rawls for not taking into account the contemporary understanding of the role of human rights. The second argues that the justifications for why a theory holds that a right is a human right should be made wholly independent of any reasons that might exist for not coercively implementing it on another society.

9.1 Rawlsian Human Rights Versus the Contemporary Understanding

Charles Beitz (2000, 684) argues that Rawls's use of human rights defies the conventional understanding of such rights. He points out that human rights in fact play a broad political role, for instance they serve as foundations for claims individuals can make against their governments, or as grounds for political action by NGOs. Furthermore he (2000, 687) writes:

(...) [H]uman rights serve not only as minimum conditions for international recognition, but also, as the declaration's preamble puts it, "as a common standard of achievement" for the guidance of "every individual and organ of society."

The conventional understanding then, of human rights is as “shared goals of political reform”, serving as focal points for NGOs and social movements within non-democratic states (Beitz 2002, 687-688). I think Beitz’s argument is a good one. However, it is not clear that this understanding is ruled out by Rawls’s framework. The Law of Peoples guides the foreign policy of the members of the Society of Peoples, not the standards that social movements in non-democratic states should use as focal points. The Law of Peoples does not deny the universality of liberalism. It only denies forceful liberalization of decent peoples.

Rawls’s claim that some of the contemporary human rights are liberal aspirations and some are proper human rights might at first sound outrageous to most liberals, as he seems to be saying that liberal justice is not universally valid. This view relegates liberalism to a question of taste, when in fact liberal peoples would rightly hold that it consists of a set of principles with universal applicability (Huseby 2007, 255). In my opinion the right interpretation of Rawls’s comment is not that he says that all individuals do not have a claim on these rights in their relation with the wielders of power in their society (Reidy 2006, 181). Rather, he does not think that they are rights that liberal peoples can force decent peoples to apply. On this understanding, all the rights of the UDHR, both urgent and liberal, can still be understood as human rights by liberal peoples, or by groupings within decent or other non-liberal societies, and thus perform the role Beitz is calling for. However, since they are not urgent enough to warrant enforcement across borders (or so Rawls claims), they are not “internationally enforceable basic human rights”³⁸.

It might still be argued though, that Rawls’s theory should not simply *allow* for a contemporary understanding of human rights. Rather, it should properly integrate such an understanding into the theory. This is a valid claim and I address it in the next section, as part of a response to Tasioulas’s claim that Rawls confounds issues of ideal and non-ideal theory.

9.2 The Cut Between Ideal and Non-Ideal Theory

Because Rawls in LP sees only those rights that if violated in principle justify coercive sanctioning, as human rights proper, Tasioulas (2002, 385-386) claims that Rawls confounds issues of ideal and non-ideal theory³⁹. The reasoning behind this claim is the argument that

³⁸ This term is borrowed from Alyssa Bernstein (2006, 281).

³⁹ Wilfried Hinsch and Markus Stepanians (2006, 127-128) discuss Tasioulas’s article. However their arguments are different to the ones I present in this chapter.

the close connection between Rawlsian human rights and coercive sanctioning implies that the list of proper human rights is likely to be shorter than just those rights every individual in fact have a claim to. According to Tasioulas (2002, 385) ideal international theory must begin with the question of what rights everyone ideally should have. A similar point is made by Alistair M. Macleod (2006, 137) who writes that there are grounds for suggesting that Rawls confounds justification and enforcement issues on human rights at important junctures. Furthermore that this is evident in his recognition of human rights as only those that, in principle, warrant coercive measures for enforcement.

Tasioulas (2002, 385) argues that, in a theory of international justice, the question “What is the list of human rights that ideally (...) should be recognized?” should be separated from other questions. These include such questions as what human rights should be part of international law, or what should be the responses to violations. According to Tasioulas, the answer to the first question should define ideal international theory. His own view seems to be that ideal theory should be a world of only liberal peoples. On his understanding considerations relating to intervention, sanctions and toleration should be part of non-ideal theory. For example, one might argue that decent peoples should be tolerated, without making them part of ideal theory (2002, 390).

(...) [N]othing in Rawls’ argument from respect or toleration shows why we should refrain from attributing a universal scope to a fully reasonable – i.e. liberal, assuming that is what it is – conception of justice. We could still, compatibly with this argument, carry on ‘tolerating’ decent societies (Tasioulas 2002, 389-390).

The Law of Peoples does not deny the universality of liberal justice. However, its role is not to specify the full principles of internal justice and legitimacy in societies that are not liberal. Its role seems to be to establish the principles that should guide international *relations*. Tasioulas seemingly does not appreciate this. He appears to identify what is ideal theory *within* domestic societies, as one and the same as ideal theory in international theory. This becomes evident with his argument that the ideal standards of international justice specify that all peoples are liberal and that this is separate from any measures used to achieve this goal. At the same time he (2002, 387) agrees that concerns for self-determination and responsibility might rule out coercive measures. In fact he seems quite sympathetic to Rawls’s arguments. But if ideas such as self-determination should lead liberal peoples to tolerate some types of non-liberal peoples and thereby extend them recognitional legitimacy, then the further concerns Tasioulas has for the internal justice of decent societies does not really seem to

necessarily be the subject of a theory of *international* justice. Rather, such concerns could belong to a theory of domestic justice. In fact it seems that it is Tasioulas himself who confounds issues. Not issues of ideal and non-ideal theory, but those of domestic and international justice.⁴⁰

9.3 Incorporating Non-Coercive measures to the theory

Tasioulas's (2002, 387-388) argues that Rawls's framework "(...) eliminates any grounds for criticizing (...) non-liberal societies for violating putatively universally applicable human rights norms".⁴¹ This reading of Rawls seems to contradict the comments Rawls (1999b, 84) makes that liberal peoples are within their rights to criticize decent peoples for not being liberal⁴². If we were to acknowledge this remark by Rawls however, and assume that liberal peoples could, and indeed should, use non-coercive measures such as critical remarks in order to try to influence the unjust policies of decent peoples, then that could in fact suggest a different ideal theory goal than the one Rawls develops in LP. Such critical remarks, or other non-coercive measures that Rawls would allow, are doubtlessly part of international relations. In fact, they might be more important parts of international relations than those measures highlighted in Rawls's theory. James W. Nickel (2006, 270-273) makes a good case for this argument. He shows that measures in international relations aimed at implementing human rights rarely consists of coercive sanctions.

Let's call criticism and condemnation of other countries that is not accompanied by significant threats "jawboning". (...) jawboning is the most common means of promoting human rights across international borders (Nickel 2006, 271).

⁴⁰ One might respond to this by arguing that Rawls does not provide a theory of internal legitimacy and justice for a non-liberal society because his domestic theory is intended for a constitutional democracy. However, because the Law of Peoples is a theory that stipulates where the level of recognitional legitimacy should go, and not a theory stipulating justice or internal legitimacy in nondemocratic societies, it can successfully be indifferent to whether a society is liberal or decent, without relying on the claim that decent peoples are internally legitimate.

⁴¹ By putatively universally applicable human rights norms, Tasioulas presumably means such rights as those Rawls identifies as liberal aspirations like democracy, full freedom of speech, and non-discrimination.

⁴² Rawls's (1999b, 84) wording is the following: "Critical objections, based either on political liberalism, or on comprehensive doctrines, both religious and nonreligious, will continue concerning this and all other matters. Raising these objections is the right of liberal peoples and is fully consistent with the liberties and integrity of decent hierarchical societies".

Rawls's framework allows a variety of non-coercive measures to implement liberal human rights in non-liberal societies. "Jawboning" is likely to be one of these. It is likely that non-coercive measures are at least as important as coercive measures when it comes to implementing human rights. Therefore it seems curious that the possibility of non-coercive measures aimed at liberalizing decent peoples play no part in stipulating the difference between ideal and non-ideal theory.

For Rawls the difference between the relevance of domestic and international theory goes with recognitional legitimacy, which as outlined earlier, seems to be found by making a compromise between liberal justice and self-determination. Once ideal international theory allows for and recognizes the self-determination of a particular people, then further questions about the internal justice of this people become the subject matter of a domestic theory of legitimacy and justice. There seems to be little basis, in my opinion, in the characterization of this cut by Rawls as a theoretical *mistake*, which is what Tasioulas's (2002, 390) argument amounts to.

Even though I believe Tasioulas is wrong to call Rawls's distinction between ideal and non-ideal theory a mistake, I think an argument can be made that Tasioulas's alternative distinction is superior to Rawls's. The problem with Rawls's distinction is that the theory excludes what are arguably the most important measures aimed at achieving justice in non-liberal societies, namely those that are non-coercive. Since Rawls is dealing with justice in international relations, and non-coercive measures aimed at liberalizing non-liberal societies should be an integral part of liberal peoples' foreign policy, then it seems his international theory should incorporate such measures, instead of simply allowing for them. If incorporated the alternative theory could state that liberal peoples should apply non-coercive measures on decent peoples until they are fully liberalized. Ideal theory would in this case be a world of only liberal peoples, even though decent peoples are extended recognitional legitimacy.

In this chapter I have argued that Rawls's decision to only include as human rights those that he deems as internationally enforceable, stands up reasonably well against criticism. First, although Rawls calls many of the rights in the UDHR for liberal aspirations, and not proper human rights, the Law of Peoples does not say that these liberal aspirational human rights cannot play the role they do in contemporary international relations. Second, the claim that Rawls confounds issues of ideal and non-ideal theory fails because LP is concerned with ideal theory in international relations, not ideal theory within a domestic society. However, if Rawls incorporated non-coercive measures into the theory instead of only

discussing coercive measures, the result could be a more ambitious and perhaps more plausible conception of ideal theory. An argument could be made in favour of incorporating non-coercive measures to the theory because such measures should be important parts of a liberal foreign policy.

In chapter 11 where I address the question of how Rawls's theory may be adjusted in a way that affords added normative force to positive duties, I develop a theory that includes non-coercive measures. Before I proceed with this chapter however, I clarify the extent that liberal cosmopolitanism and the Law of Peoples differ. Here I claim that the two positions are not mutually exclusive as some suggest. In fact, to a certain degree the Law of Peoples can operate within a larger liberal cosmopolitan theory.

10 The Law of Peoples *Versus* Liberal Cosmopolitanism?

Liberal cosmopolitanism might entail many different judgements about what international justice consists of. However, when I use the term am referring to a set of beliefs about international and domestic justice that entail two main judgements: 1. Any state must be a liberal democracy for there to be internal political legitimacy in that state. The fact that the predominant culture attached to a specific society is dominated by beliefs that say democracy is not for them does not change this. 2. An overarching goal of the foreign policy of liberal peoples should be to spread liberal reforms, and therefore political legitimacy, to all states. The minimally acceptable ideal world of a liberal cosmopolitan is one where all states are liberal democracies. This is a world where all individuals enjoy important liberal rights. In this chapter I will claim that these two beliefs are possible to combine with the Law of Peoples. In order to do this I draw upon arguments made in preceding chapters. Chapter 5 and chapter 9 are central in this respect.

10.1 Internal Political Legitimacy

In a critical review of LP, Pogge writes the following:

(...) [I]f liberal and decent hierarchical societies really are morally on an equal footing, then should not our move from a liberal to a decent regime be just as acceptable as our previous opposite move was, or as Iran's now would be (Pogge 2001, 247)?

It is true that the Law of Peoples is indifferent to whether a society is organized as a liberal or a decent people. However, the Law of Peoples is only Rawls's international theory. If a liberal society reformed to a decent one, the moral implications of this is the proper domain of domestic theory. Obviously, a liberal people that reformed into a decent people would not be indifferent from the point of view of Rawls's domestic theory. As the Law of Peoples only focuses on recognitional legitimacy, its equal treatment of decent and liberal peoples is possible to combine the belief that all states should be organized as liberal democracies for there to be internal political legitimacy.

The liberal cosmopolitan idea of internal political legitimacy then, is compatible with the Law of Peoples. It might seem that Rawls's theories are agnostic to what internal legitimacy requires in non-liberal societies because in PL Rawls (1993, 137) only formulates a *liberal* principle of legitimacy. However, in a revised version of the principle, Rawls (1999b, 137) simply refers to it as an "(...) idea of political legitimacy". However, whether Rawls's theories are agnostic or not regarding the issue of whether other standards of internal political legitimacy apply in non-liberal societies than in liberal societies, is not the issue here. I only say that Rawls never commits to a statement that claims there is internal legitimacy within decent societies. If he did, then I do not think that liberal peoples could accept the Law of Peoples because it would rely on a morally relativistic argument that betrays their most basic assumptions. The question of internal legitimacy however, is not the most important one when relating the Law of Peoples to liberal cosmopolitanism. The most important question is that of recognitional legitimacy, and its relationship to the ideal of a world consisting of solely liberal democracies.

10.2 Recognition and the Foreign Policy Goal of a World of Liberal Democracies

Huseby (2007, 253) makes a similar argument to that of Pogge and claims that the Law of Peoples cannot be a liberal theory of international justice.

Liberalism as such cannot accept the curtailment of individuals' right to free speech. If liberals do accept this, they must rely on pragmatic and moral reasons other than those that follow from liberalism. And although this might be reasonable, the resulting conception would not be an instance of ideal liberal theory.

I believe Huseby has a valid point when he writes that in order for liberals to accept decent peoples, they must rely on other moral reasons than those that follow from liberalism itself. However, I disagree with Huseby (2007, 250-252) when he argues that the decision to tolerate decent peoples is incompatible with liberalism. Rawls sees the value of the self-determination of a people as overriding a liberal people's concern over the lack of internal justice in decent peoples. This judgement is not obviously inherent in liberalism itself. However, it is not at odds with the idea that political legitimacy demands liberal institutions. Furthermore, the degree to which Rawls thinks the value of self-determination overrides concerns over liberal justice stops at recognition as equal members of the Society of Peoples.

This means that the Law of Peoples allows liberal peoples to do all in their power, short of violating the recognitional legitimacy of decent peoples, to try to liberalize such peoples. The value that Rawls believes liberal peoples should put on the self-determination of decent peoples does therefore not contradict the liberal aim of a world of only democratic states.

Liberal cosmopolitans generally argue that because there is not political legitimacy in any type of non-liberal state, such states might be the object of sanction. However, while the judgement of the moral illegitimacy of a regime is a necessary condition for coercive intervention according to the liberal cosmopolitan, it is obviously not a sufficient justification. Especially when referring to military measures (Tan 2005, 702). Since there might be reasons for not allowing coercive measures, liberal cosmopolitans have an arsenal of non-coercive measures at their disposal to assist in achieving the goal of a world of liberal democracies:

Active critical engagement, political negotiations, and trade incentives (and even disincentives under appropriate conditions) are obvious non-military alternatives to realizing cosmopolitan ends without resort to force. The active and organized use of what Joseph Nye calls ‘soft power’ – education, intellectual exchanges, cultural dissemination, and so on – to encourage nonliberal states to come to appreciate liberal values is another peaceful and co-operative method of encouraging liberal reforms in nonliberal societies that cosmopolitans can endorse (Tan 2005, 703).

What is interesting about the measures listed above is that only the one concerning economic incentives is ruled out in the Law of Peoples⁴³. Non-coercive, co-operative measures based on encouragement, as well as criticism is not at odds with Rawls’s conception of international justice. In fact he seems to presuppose their presence (Rawls 1999b, 61, 84). It can therefore be concluded that the liberal foreign policy goal of a world of only liberal democracies is compatible with the Law of Peoples.

Assume that Juliet believes that all states must respect central liberal principles for there to be internal political legitimacy. Furthermore she aspires to a world where all societies are internally legitimate. She also believes that liberal peoples should make use of any soft power and non-coercive measures available to them in order to liberalize decent peoples.

⁴³ The argument that liberal peoples should not offer decent non-liberal peoples economic incentives to make liberal democratic reform is not put forward very strongly by Rawls. Rawls writes that persons in civil society might raise private funds for this purpose. Rawls is concerned that the duty of assistance is more pressing than subsidizing liberal reform in decent societies where basic human rights are protected. Furthermore, he seems primarily concerned that incentives within a Society of Peoples would lead to serious conflict. These concerns seem to be pragmatic and not moral (Rawls 1999b, 84-85). Therefore one might argue that if situations were these concerns are not warranted were to appear, then Rawls would accept the use of economic incentives to encourage liberalization.

However, because she holds the self-determination of a people to be an important good, she thinks that decent peoples should not be *forced* to liberalize. This is not a pragmatic judgement. For example, it is not the result of a belief that coercive measures are dangerous and rarely accomplish anything. Holding this set of beliefs, she should be ready to accept Rawls's Law of Peoples. However, Juliet seems to also be a liberal cosmopolitan. She thinks political legitimacy demands liberal democracy. Furthermore, she believes that an overall goal of the foreign policy of liberal peoples should be to work actively to reform all states accordingly. This example illustrates the large overlap between the liberal cosmopolitan view and that of Rawlsian international theory. The two schools of thought are not as contradictory as often suggested.

This chapter has showed that a liberal cosmopolitan need not concede her beliefs about internal legitimacy in order to endorse the Law of Peoples. Only recognitional legitimacy becomes the contested issue. Rawls relies on the value of self-determination in order to justify that recognitional legitimacy should not follow from an account of internal legitimacy. However the important point is that while decent peoples are extended recognitional legitimacy, an arsenal of non-coercive measures might be used by liberal peoples with the goal of achieving a world of liberal democracies. The Law of Peoples does not address these non-coercive measures⁴⁴, but it is compatible with their implementation. To the extent that liberal cosmopolitans would tend to agree with Rawls's judgements on how the value of self-determination overrides issues concerning the lack of internal political legitimacy in decent peoples, the Law of Peoples could be seen as operating within a larger liberal cosmopolitan thesis of international justice.

The discussions in the last two chapters build towards the next chapter. Within it, I sketch a theory of international justice that combines several intuitions of liberal cosmopolitanism and the main judgements as well as the general approach of Rawls's Law of Peoples. In doing so, I address the second question I set out to answer in this thesis, namely how Rawls's theory can be adjusted in a way that affords added normative force to the idea of positive duties across societies.

⁴⁴ I argued in chapter 9 that this is a weakness of Rawls's theory. Therefore it is one of the issues addressed in chapter 11 where I propose an alternative Rawlsian theory of international justice. Including non-coercive measures in the theory leads to a more ambitious cut between non-ideal and ideal theory than the one Rawls sketches in LP.

11 An attempt at Reformulation: A “Rawlsian” Liberal Cosmopolitan Theory of International Justice

In this chapter I sketch a theory of international justice, which builds on the Law of Peoples and affords added normative force to the idea of positive duties across societies. I assume that for there to be internal legitimacy in any polity, it must be governed by a liberal democracy⁴⁵. I have earlier argued that this judgement does not contradict what Rawls writes in LP because the idea of decency is exclusively concerned with the question of recognitional legitimacy. I take internal political legitimacy to mean that the wielders of power in the society in question are morally justified in enforcing their laws (Buchanan 2004, 233).

After I have sketched my proposed theory of international justice, I consider the merits and problems associated with it.

11.1 The problem with International Positive Duties

In the introduction, I posed two main questions. The second was the following:

(2) Bearing in mind the criticisms of Rawls’s conception of human rights identified in the treatment of question (1), how can The Law of Peoples be adjusted in a way that affords added normative force to the idea of positive duties across societies?

In an article largely sympathetic of Rawls’s position in LP, Pettit (2006, 54) notes that the only real weakness of the theory is at the point where thinkers of a more cosmopolitan egalitarian persuasion tend to agree with him:

If there is a weakness in Rawls’s schema it shows up, ironically, with the principles on which radical cosmopolitans are likely to agree rather than disagree: namely, that well-

⁴⁵ This follows Rawls’s liberal principle of legitimacy from PL. The intuitive appeal of this assumption rests on the idea that internal legitimacy demands a certain commitment to justice, and that justice demands liberalism (Buchanan 2004, 247). The claim that internal legitimacy demands liberalism is furthermore based on an assumption of favourable conditions making liberal democracy possible to sustain. If such favourable conditions are not assumed and liberal democracy is impossible to sustain (for instance due to a severe lack of resources), then some more primitive form of governance might be morally acceptable. Rawls (1999b, 108) argues that there is basically no society in the world with so few resources that it could not sustain well-ordered institutions if given the chance by the duty of assistance,

ordered peoples should help those who live under oppressive and burdened regimes. For if those in the second original position represent only well-ordered societies, and not individuals across all societies, then it is unclear why they would have a rational motive for endorsing such altruism.

In my discussion of Freeman's defence of Rawls's list of human rights, I argued that it is not plausible to model the representatives of liberal peoples as strictly rational self-interested, because all liberal peoples would be fundamentally concerned about the universal value of urgent human rights as well as the universal value of liberal democratic rights. These beliefs should be attached to the very nature of a liberal people. The selection of the human rights principle in itself is not, however, the subject of Pettit's argument for a weakness in Rawls's framework. More precisely, Pettit questions the willingness of the representatives in the original positions to endorse principles that involve altruistic duties. One question concerns the will to implement coercive sanctions against oppressive regimes. However, Rawls never states that there is a *duty* on the members of the Society of Peoples to implement coercive sanctions. Human rights violation simply justifies such measures. There seems to be little case then, for liberal peoples to not endorse the human rights principle.

Therefore the problem resides with the duty of assistance. While the other principles of the Law of Peoples would seemingly not involve drastic changes to the current state of international relations, the duty of assistance, if acted upon, would. As such, it is the most progressive principle for Rawls. Assume that we accept that LP gives a full account of what international justice means. We then compare the current state of liberal foreign policies with those LP professes. It seems likely that the duty of assistance is the principle that most pressing demands reform. For the non-ideal world in which liberal foreign policies exist in at this point in time, the duty of assistance then, is arguably the most important part of the Law of Peoples. However, the original position argument Rawls utilises does not show why this principle should be selected.

It is hard to see how such a duty could be derived from the apparatus of the global original position, given that the main beneficiaries of the principle are not even represented there, and that beneficence is not included as a motivation of the representatives who select the principles (Costa 2005, 53).

I agree with Pettit and Costa that this is a weakness in Rawls's theory. Furthermore, I think that only an original position where the interests of individuals in all the societies in the

world are present can show why the representatives of liberal peoples would endorse the duty of assistance.

Three assumptions underline my claim that the duty of assistance is problematic for Rawls's theory on international justice: (1) The principles of international justice are to be identified through the use of a second-level original position with representatives of liberal peoples. (2) Such representatives are unlikely to impose the duty of assistance on themselves. Put together these two assumptions bring the conclusion that the principles of international justice do not include Rawls's duty of assistance. The third assumption is that (3) a Law of Peoples that does not include the duty of assistance fails to give a plausible account of international justice.

I think these are reasonable assumptions to make, however the point of this chapter is not to defend these assumptions, but to show how Rawls's theory might be reformulated in a way that leads the duty of assistance to follow from the original position argument, when all of the above assumptions are accepted. The main challenge for this reformulation is that, given assumption (2), assumption (1) and assumption (3) seem to be incompatible.

11.2 Under what Idealized Conditions can the Principles of International Justice be identified?

The principles of international justice have direct bearings on all domestic societies, and therefore indirect bearings on all individuals. For this reason, it seems natural that, ideally, all domestic societies should be represented in the original position. The rules involve all of them and affect all of them, including their members.

This claim is upset by the fact that, ideally, only a certain kind of domestic society legitimately can be part of an international social contract deciding the principles of international justice. Only representatives for states where there is internal political legitimacy should be given a veto power in an international original position. One reason for this is that the representatives of some types of states would not have any morally relevant say about principles of justice. For instance, the principles of international justice that a representative for the state of North Korea would select are not of interest. A state with internal legitimacy can only be achieved however, if it is governed by liberal, democratic principles (and presented with certain favourable conditions⁴⁶). I have argued that Rawls is not committed to

⁴⁶ See footnote 45.

saying that decent peoples are internally legitimate, and that his inclusion of decent peoples in the social contract only argues that decent people are worthy of recognitional legitimacy. One might argue that this means that decent peoples should be part of the original position that chooses the principles of international justice. For Rawls, however, it is liberal peoples that choose the principles. The point of extension to decent peoples is to argue that they also would choose the same principles. That decent peoples indeed endorse the same principles is only relevant when it is first established that liberal peoples would choose the principles.

Another condition is, as is natural when theorizing on Rawls's premises, that the parties to the original position do not know their relative strengths, in addition to other similar information deemed irrelevant from a moral perspective. This is achieved by the use of a veil of ignorance.

I contend that, ideally, these are the conditions under which the principles of international justice should be arrived at. However, these conditions are not consistent with each other. It seems that we cannot combine the first judgement that representatives for all domestic societies in the world should be represented in the original position, and second judgement, that only liberal peoples should be represented. For Rawls this dilemma is resolved because he only allows liberal peoples in the first second-level original position where the foreign policy principles of liberal democratic peoples are chosen. This seems to be the only way to address the issue. However, I will argue that another option is possible. This alternative makes it possible to combine all the elements necessary to arrive fairly at the principles of international justice. Not only does this strengthen the claims of the principles because they are chosen by all affected domestic societies, it also provides a compelling argument for why the duty of assistance would be selected, and therefore must be seen as part of international justice.

11.3 Basic Idea: Applying the First-Level Original Position in all Domestic Societies

The basic idea is that when starting with the first-level original position, we assume that since its principles are universal in their normative power, as we as liberals believe they are, the first level original position is conceived of as having taken place in all domestic societies in the world. When we move to the second-level original position, however, which is populated by representatives from each of the first-level social contract peoples, the parties to the

original position do not know whether the state their people inhabit in fact matches the principles of justice selected in the first original position. They might represent the people of an outlaw state, a decent society, a liberal society or other possible variants.

When such representatives are presented the list of principles in the Law of Peoples, there is little question that they would strongly endorse the duty of assistance and the human rights requirement. They believe, because they represent a people that have gone through the first level original position, that the domestic society they represent should be organized as a liberal people. However, they do not know whether this aspiration is matched by the realities. This is true even if we model the representatives in the original position as exclusively concerned with their rational self-interests, the same way Freeman argues that we should.

The duty of assistance would be selected because all the representatives know that once the veil of ignorance is lifted on the second-level original position, anyone could risk being representatives of burdened societies. Some might argue that the representative in this original position would endorse a more extensive principle than the duty of assistance. This might be true. However, Rawls does not argue that liberal peoples would choose any principle of distributive justice among themselves. If he is correct in this assertion, then there is no reason to assume that the representatives in my proposed second-level original position would argue for further redistribution once they are all liberal. Therefore, whatever principle for distributive justice the representatives in my original position affirm, it will be a variant of the duty of assistance. Whatever arguments can be made against this claim apply equally to Rawls's claim. For the purposes of this thesis I have accepted that Rawls's representatives would not agree to a more extensive principle than the duty of assistance with its target and cut-off point.

When it comes to the human rights principle, the representatives would, since they represent peoples and therefore care about their self-determination and proper self-respect, be able to acknowledge that only the violation of some rights warrant coercive measures. There is no reason to think that the liberal representatives in this version of the second-level original position would come to different conclusions on the value of self-determination for a people than the representatives in Rawls's. And so, if Rawls is right that liberal peoples would tolerate decent peoples, also these representatives will agree that some non-liberal, decent peoples should be tolerated in the Rawlsian sense, based on the value of self-determination for a people. However, based on the first level social contract it is evident that they are firmly attached to the idea of liberal justice, and therefore they argue that the universal rights that

might not be coercively enforceable such as democratic participation and full freedom of speech, in addition to all other liberal rights, are the responsibility of all liberal peoples to encourage and try to implement by non-coercive, toleration-compatible (or recognition-compatible) measures in all societies that are not fully liberal. These soft-power measures, as noted earlier, are likely more numerous and more central to contemporary international relations than the coercive measures so central to Rawls's framework.

The resulting international social contract is fully compatible with the formation of a Society of Peoples consisting of both decent and liberal peoples. At the same time, ideal theory for international justice is specified as a Society of only Liberal Peoples, a world where all individuals enjoy rights to equal democratic participation, freedom of speech and non-discrimination.

Reformulating Rawls's theory of international justice in this way makes the argument that the human rights principle must be acceptable to those that deny that persons should be treated as free and equal non-viable. I have argued against this argument and I do not believe it to be necessary for Rawls's purposes. Furthermore, even if we assume that all representatives act purely out of self-interest, they would all endorse positive duties across borders based on first securing a liberal or decent well-ordered society to all, then further implementing liberal rights to all by non-coercive measures. This way, the use of an international original position adds considerable normative force to the idea of duties of assistance, as well as universal human rights (both internationally enforceable, and otherwise).

11.4 Social Contracts and the Idea of Popular Sovereignty: Conceptualizing the Representative of the Hypothetical Liberal People.

One of the most striking features of the theory of international justice sketched above, as it relates to Rawls's account, is that the second-level social contract separates the idea of a people, from the institutions of the state in question. In my opinion, it could be said that this feature is inherent in the social contract approach.

The principles resulting from a first-level social contract properly reflects an idealized idea of popular sovereignty. By "popular sovereignty" I mean that the power of the state is rooted in the collective people through the agreement in the original position of the social

contract. It is idealized because it is formed under the constraints of the first-level original position with its veil of ignorance. The international theory of justice I sketched above takes this idea of popular sovereignty to the second-level social contract and its original position. The appeal to the idea of popular sovereignty and its relationship to the idea of social contracts, helps conceptualize the proposed approach. By this I mean that the idea of popular sovereignty gives meaning to the idea of representatives of domestic societies that does not exist at the institutional level. The idea of the people is separated from the reality of the state for the purposes of the second-level original position.

Without this concept it would perhaps seem less plausible that representatives of hypothetical liberal states met in an original position. For instance, why should a representative for a state that turns out, after the veil(s) of ignorance is lifted, to be an outlaw state, be represented in the second level original position as a liberal people? The answer is that all domestic societies should be represented in the original position. Furthermore, the representatives should be modelled as representing states that qualify for internal legitimacy. The relationship between this domestic theory ideal and the idea of popular sovereignty, however, tells us *how* we can conceptualize such a representative.

The principles required for internal political legitimacy are arrived at through a social contract that reflects an ideal conception of popular sovereignty (the first level original position). Since only the actual people, and not the institutions that form part of the basic structure of their society, are represented in the original position, the resulting principles for how the basic structure of the state should be organized, transcends any actual institutions, they only belong to the individuals that form part of the social contract. Therefore a liberal people can be represented in a second-level original position just on the merit of the first-level original position.

The institutions of a Rawlsian liberal people are closely connected to an idea of popular sovereignty through the use of the social contract to legitimize them. Since the power of the state, through the social contract, belongs to the people, the state and the people can be separated for the purposes of the second-level original position. This way it is, in my opinion, conceptually possible, even plausible, to populate the second-level original position with representatives of all domestic societies in the world, and at the same time imagine that all these representatives in effect are representatives for liberal domestic societies.

11.5 The Merits of the Proposed Theory

The theory of international justice I have proposed, which is a reformulation of Rawls's Law of Peoples, has several important benefits.

To begin with, it is compatible with Rawls's judgements on toleration and internationally enforceable human rights in LP, whilst at the same time distancing itself from the morally relativistic arguments that LP is rightly criticized for. Furthermore, it incorporates non-coercive measures by liberal peoples into the theory. Such measures are arguably as important as coercive measures, when it comes to changing the policies of other states. Rawls's framework simply allows for such measures. I hold that they are central to justice in international relations. These changes however, are possible to incorporate into the Law of Peoples with less dramatic changes than the one I propose. However, my sketched theory has at least three more significant benefits.

First, all the peoples in the world are represented in my proposed second-level original position. Therefore all the individuals in the world are indirectly represented. One might ask what is the usefulness of this broad representation. Rawls for instance, only lets liberal and decent peoples into the original position(s). And the latter only after making the argument that they are capable of agreeing to the same principles as put forth by liberal peoples. This however, is asking the wrong question. The right question is why any domestic society should be omitted from the social contract in the first place. As all are part of international relations, all are relevant subjects of the theory. Rawls however, has good reason for restricting the selection of the principles of international justice to certain types of domestic societies. Because the motivations and goals of societies that are not at least decent and well ordered are not compatible with anything we could accept as a reasonably just Law of Peoples, their viewpoints are not of interest. However, I have shown how representatives for any domestic society in the world could and should be modelled in a way so this problem is avoided. The idea of popular sovereignty inherent in the first-level social contract allows for the people and the state to be separated for the purposes of the second original position. Therefore, the reason why the original position is restricted to only some domestic societies is gone.

Second, recall Reidy's argument that liberal peoples choose which human rights are internationally enforceable by asking themselves at what level of internal justice they would see themselves as deserving of self-determination. Reidy argues that in light of this question Rawls's list of human rights is plausible, because only rights necessary for a viable constitutional republic would be chosen. One benefit of the second-level original position I

have constructed is that it enables a fair balance between the value of self-determination and the ideal of liberal justice. The representatives have an interest in the self-determination of their society, which will be challenged if the domestic societies they represent do not respect internationally enforceable human rights. At the same time, they are committed to the ideals of liberal justice. The “proper subset” of the rights of a constitutional democracy they would choose as internationally enforceable human rights then, will signal where they put the balancing point between the value of self-determination and liberal justice. The argument about when self-determination is warranted is, of course, possible to make without using the second-level original position as I have constructed it. However, the weighing of the two values has direct bearings on the representatives in my version of the second-level original position. It might be easier to evaluate whether Reidy’s argument is sound when the consequences of the choice have direct bearings on the choosers. For example, if too much emphasis is placed on self-determination in Rawls’s version of the original position, there are no consequences for the representatives of liberal peoples that decide the balance point. In my version a wrong balance point will have significant negative repercussions for the represented parties. The benefit here is that when the original position is constructed the way I have argued for, we might more clearly evaluate the relationship between the value of self-determination and liberal justice.

Third, and most importantly, due to the way I have set up the original position, the international social contract affords added normative force to positive duties across borders and to the idea of universal human rights. The duty of assistance, with all its demands of fair trade relations with burdened societies as well as transfers to raise such societies out of poverty, undoubtedly follows from my version of the second-level original position⁴⁷. This is not the case in Rawls’s version. As such, the theory I have sketched provides the answer to the second question of this thesis.

⁴⁷ It might be argued that the duty of assistance as Rawls conceives of it does not include any measures to domestic societies that have enough resources to sustain decent or liberal institutions, but where the wielders of power choose not to reform. The human rights situation in this society might be bad, but since the wielders of power do not want to change the system of governance, the duty of assistance does not address the human rights problem. Pogge (2006, 212) argues that the basic needs of human beings in benevolent absolutisms and outlaw states are ignored by Rawls. It could be this understanding of the duty of assistance is not particularly charitable of Rawls’s position. However, in my version of the second-level original position it seems likely that the representatives would agree to a humanitarian commitment as part of the duty of assistance, which specifies that the international community should protect urgent human rights directly.

11.6 The Problems of the Proposed Theory

Despite the significant benefits associated with the theory I have outlined in this chapter, some potential concerns also arise. First, it takes a stance on the universal applicability of Rawls's first-level social contract. Although Rawls does not say that his account of decency gives an account of justice or internal legitimacy for a non-liberal society, he also refrains from saying that liberalism is universal. I have argued that LP does not need to say this, because it is exclusively concerned with the issue of recognitional legitimacy. However, I have constructed the second-level original position using the assumption that for there to be political legitimacy in a domestic society, the members must be treated as free and equal. Therefore laws that discriminate against certain groups like women, certain ethnicities, or religious minorities, as well as laws that put unreasonable limits on the freedom of speech, cannot, according to this assumption, be morally justified. For a domestic society then, to be internally legitimate, it must be a liberal people, adhering to certain principles specified by first-level original position.

Second (and related to the first point), although Rawls does not use decency as a standard for internal legitimacy in non-liberal societies, he (1999b, 70) does say that "(...) an original position argument for domestic justice (...) does not apply to the domestic justice of a decent hierarchical regime". In other words, the first-level original position cannot be used in non-liberal societies. The reason for this is that "[o]nly equal parties can be symmetrically situated in an original position" (Rawls 1999b, 70). In societies where all individuals are not seen or treated as free and equal, they are not situated symmetrically. Rawls's theories then, seem to be agnostic when it comes to internal legitimacy and justice in non-liberal societies.

Huseby (2007, 256) has argued that, since Rawls's first-level original position is restricted to members of societies that are already governed by liberal ideas, it is subject to "(...) dramatic limitations as to its scope".

In a way, this theory of justice kicks in *after* the most fundamental fact. It applies only *after* persons are allowed to see themselves as free and equal. Those who do not have the opportunity to conceive themselves thus, are left to their own devices (Huseby 2007, 256)

I agree with Huseby here⁴⁸. The arbitrary fact that a society is organized hierarchically seems a poor reason for why we cannot use an original position argument to specify principles of justice and legitimacy for such a society. One might say that it makes little sense to model representatives in an original position as reasonable, when the individuals they represent are in fact not reasonable, and for instance believe women are not equal to men. Thus they would not be willing to propose and abide by mutually acceptable rules, even if assured that others would also do so (Rawls 1993, 49). However, it seems to me that whenever justice and the legitimate use of power are the issues at stake, it makes perfect sense to model representatives as reasonable. If we do not assume that the representatives in the social contract should be modelled as reasonable, then what such representatives might say about justice is not of interest.

According to Huseby (2007, 255) there is “(...) nothing in Rawls’s grounds for freedom and equality that could not be transferred to the members of hierarchical societies”. It might be a problem for the theory I have sketched that it relies on such a transfer, because it seemingly breaks with some of the fundamental assumptions of Rawls’s constructivist approach. However, I agree with Huseby (2007, 256) that to deny members of hierarchical societies a ticket to the domestic original position because they are not treated as free and equal is not a compelling argument. It might be the case that this brief discussion opens up deeper questions concerning the nature of Rawls’s constructivist approach. However, this is not the place for addressing such questions.

In this chapter I have shown how Rawls’s international theory can be adjusted in a way that affords added normative force to the idea of positive duties across borders. I have argued that this can be seen as necessary, because Rawls fails to provide a compelling argument for why the parties to the international original position(s) would put these duties on themselves. My sketching of an international theory of justice combines intuitions from liberal cosmopolitanism with the judgements and general approach of Rawls’s theory. In conclusion, I have discussed some of the benefits and problems associated with the theory of international justice I have sketched.

⁴⁸ However, I disagree with a related inference Huseby draws from this statement, namely that Rawls’s theories *justify* the status quo of hierarchical peoples. As I have argued, Rawls only commits to saying that decent peoples deserve recognitional legitimacy, not that they are internally legitimate. If this assessment is correct, Rawls makes no justification on the internal legitimacy or justice of decent non-liberal societies. Consequently their status quo is not justified.

12 Conclusion

Upon conclusion of this thesis, it is evident that a need exists to summarize the different arguments presented. An overview is provided in pages V and VI. Additionally, section 1.2.2 also provides a brief summary of the claims made. Therefore, I conclude by focusing sharply on the questions originally presented and the relationships between the various arguments that address them.

12.1 Addressing The First Question: Main Arguments

The first question of this thesis has been the following:

(1) Can the conception of human rights Rawls adopts in the Law of Peoples be plausibly defended?

This thesis has reflected on this question mainly in light of three interpretations of Rawls's position. I have argued that the fact (if it is a fact) that international society involves a larger variety of moral beliefs than a democratic society does not amount to a compelling argument for why the human rights principle must be acceptable to those that reject liberalism as merely western. Furthermore I find it very hard to believe that liberal peoples would acknowledge this argument. Liberal peoples would not argue that there is a need to develop principles that are objective between their liberal conceptions of justice and beliefs that deny the most basic assumptions of liberalism. I do not claim that these are original arguments. I take them to be central to criticism of Rawls made by numerous liberal critics⁴⁹. I am confident that the argument that the human rights principle must be acceptable to those that reject liberalism does not amount to a plausible defence of the conception of human rights in the Law of Peoples. However, as has become clear throughout this thesis, this does not rule out the *result* that the human rights principle is acceptable to those that deny liberalism.

Reidy's argument that a liberal people's own claims to self-determination correspond with a polity that only respects Rawls's list of human rights is, in my opinion, plausible. As such Reidy provides a plausible defence for the conception of human rights in the Law of Peoples. The result of this argument is a list of human rights that is in fact acceptable to those

⁴⁹ These include, but are not restricted to Buchanan (2006), Huseby (2007), Pogge (2006) and Tan (2005).

that deny liberalism as merely western. However, this does not mean that a desire to make concessions to such beliefs underline the decision to keep the list narrow. Several objections could be made against Reidy's justification. It could be said to overvalue self-determination at the expense of liberal justice. Additionally, it could be said rely on a form of selection bias. Furthermore, it relies on the understanding that the role of the human rights principle is to specify when forceful intervention can be legitimately applied. However, I do not think these objections defeat the argument.

Freeman argues that the representatives of liberal peoples should be modelled as exclusively self-interested. According to Freeman, this would lead to the list of human rights that Rawls presents. Freeman argues that under the veil of ignorance, none of the representatives know if the people they represent have neighbouring countries that do not respect or honour Rawls's list of human rights. Furthermore that all such states are dangerous to the security and rights of the members of at least the surrounding countries. The representatives of liberal peoples would therefore select Rawls's list of human rights. I am confident that Freeman is wrong in his assessment. Firstly, if the representatives of liberal peoples were to ignore the belief of all liberal peoples that all individuals should enjoy both urgent and liberal human rights, they could simply opt to handle dangerous states according to whichever measure would best guarantee the safety of liberal peoples and the rights of their citizens. Sometimes it would be rational to help a dangerous state develop to a well-ordered people. However, liberal peoples would ignore states with strong institutional power and strict control over its members even if it subjected these members to the cruellest forms of oppression. Secondly, presuming that the representatives know that one of the roles of human rights is to function as a criterion for inclusion in the Society of Peoples, it would not be fair to model them to ignore the moral convictions of liberal peoples. I have argued that there are plausible reasons to tolerate decent peoples, however, Freeman's suggestion on how this conclusion should be arrived at betrays the beliefs of liberal peoples. In my opinion this means that it would be unreservedly reasonable for liberal peoples to reject the human rights principle that their representatives have selected as too narrow. This does not mean that it would be wrong of liberal peoples to endorse Rawls's version of the human rights principle. It only means that they could not possibly be expected to accept it in light of Freeman's proposed justification. Freeman relies on an unsettling dissonance between the representatives and represented. This dissonance is untenable. It is mainly because of these two arguments that Freeman does not provide a plausible defence of the conception of human rights in the

Law of Peoples. However, I have discussed additional arguments as well. Freeman's proposed justification is unappealingly instrumental. Furthermore, it seemingly contradicts Rawls's own account.

12.2 Addressing the Second Question: A Culmination of the Preceding Discussions

The second question of this thesis has been the following:

(2) Bearing in mind the criticisms of Rawls's conception of human rights identified in the treatment of question (1), how can the Law of Peoples be adjusted in a way that affords added normative force to the idea of positive duties across societies?

While I have allocated considerable space to address question (1), the treatment of question (2) is only briefly analysed in one chapter. Furthermore, while question (1) deals with the human rights principle, question (2) focuses on the duty of assistance. As such, question (2) might seem a bit out of place. However, the addressing of this question serves as a culmination of all the discussions relevant for the answering of question (1).

First, the theory proposed in the chapter that addresses question (2) treats the argument that a human rights principle must be acceptable to those that reject liberalism as non-viable. Second, my claim that the proposed theory does not contradict the judgements of the Law of Peoples rests partly on my argument that within LP, Rawls only takes a stance on the question of recognitional legitimacy. Third, the proposed theory shows how Freeman's contention that the representatives should be modelled as rational and self-interested can be achieved in a way that does not betray the basic interests of liberal peoples. Fourth, the proposed theory serves to better evaluate Reidy's justification for Rawls's list of human rights. Fifth, Reidy's defence depends on the assumption that the role of human rights is to specify when coercive sanction is allowed. This could be seen as problematic because the contemporary role of human rights is more extensive than Rawls's account and human rights are often implemented by less dramatic measures than those described by Rawls. Therefore, my proposed theory incorporates non-coercive and soft-power measures aimed at implementing human rights. While the thesis attributes significantly less text to question (2) than that of question (1), it is nonetheless written in such a way that reflects upon and incorporates much of the preceding discussion. Therefore it is thoroughly connected to the rest of the thesis. Of course, my

proposed theory does in fact also answer the question at hand and show how Rawls's international theory of justice can be adjusted in a way that affords added normative force to the idea of positive duties across borders. Furthermore it serves as an example of how certain liberal cosmopolitan convictions can be combined with the judgements and general approach in LP.

These remarks comprise the conclusion to this thesis. Reflecting on the points made in the two sections of this final chapter, it is clear that this thesis has achieved its primary objectives.

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